117.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 617

W. YALE SMILEY, PETITIONER,

vs.

MIKE HOLM, AS SECRETARY OF STATE OF THE STATE OF MINNESOTA, ST. PAUL, MINNESOTA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

PETITION FOR CERTIORARI FILED JANUARY 5, 1932

CERTIORARI GRANTED FEBRUARY 15, 1932

(36,431)

( )

SUPREME COURT OF THE UNITED STATES

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IN SUPREME COURT OF MINNESOTA

1931

THE STATE OF MINNESOTA Upon the Relation of W. YALE SMILEY, Appellant,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, Respondent

IN DISTRICT COURT OF RAMSEY COUNTY

PETITION

To the Honorable the Judges of the District Court of Ramsey County, Minnesota, Second Judicial District:

I

The petition of W. Yale Smiley respectfully shows to the Court that he is a citizen, elector and taxpayer of the State of Minnesota, residing in the City of Minneapolis, Hennepin County, Minnesota, in the Fourth Ward of said City.

II

That he requested Hon. Henry N. Benson, Attorney General of the State of Minnesota, to make this Petition and that said Henry N. Benson, Attorney General of Minnesota, refused so to do on April 29th, 1931, for the reason that it is his duty to appear as attorney for all state officers when sued in their official capacity.

III

That Mike Holm is the duly elected, qualified and acting Secretary of the State of Minnesota, and that his official acts are done and performed at the State Capitol, in the City of St. Paul, Ramsey County, Minnesota.

[fol. 2] IV

That the Congress of the United States by act of August 8, 1911, duly determined that there shall be elected ten members of Congress from ten districts in the State of Minnesota, and that said districts shall be "composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants," said act hereinbefore referred to is hereby made a part hereof with the same force and effect as is hereat set out in full.

V

That pursuant to Section 22, Subdivision (a), of an Act of Congress approved June 18, 1929, entitled "An Act to provide for the fifteenth and subsequent decennial censuses, and to provide for apportionment of representatives in Congress," the President of the United States on December 4, 1930, transmitted the following message to Congress:

"To the Congress of the United States:

"In compliance with the provisions of Section 22 (a) of the Act approved June 18, 1929, I transmit herewith a statement prepared by the Bureau of the Census, Department of Commerce, giving the whole number of persons in each state, exclusive of Indians not taxed, as ascertained under the Fifteenth Decennial Census of population, and the number of Representatives to which each state would be entitled under an apportionment of the existing number of Representatives by the method known as the method of major fractions, which was the method used in the last preceding apportionment, and also by the method known as the method of equal proportions.

Herbert Hoover.

The White House,
December 4, 1930."

Alleges that the statement accompanying the President's message, insofar as it relates to the State of Minnesota, is as follows:

[fol. 3] Population as enumerated April 1, 1930 . . 2,563,953
Indians not taxed 12,370

Population basis of apportionment	2,551,583
Apportionment of 435 Representatives by a method of Major fractions used in last preceding apportionment	9
Equal proportions	9

Reference is hereby made to said Act of Congress of June 18, 1929, last mentioned and said message of the President of the United States thereunder with the same force and effect as if said Act and said message were hereat set out in full.

VI

That pursuant to said Act of Congress, last mentioned, Wm. Tyler Page, Clerk of the House of Representatives of the United States, on or about March 6th, 1931, transmitted to the Governor of the State of Minnesota, the following certificate:

"House of Representatives, Clerk's Office, Washington, D. C.

"I, Wm. Tyler Page, Clerk of the House of Representatives of the United States, hereby certify, pursuant to Section 22, subdivision (b) of the Act of Congress of the United States of America entitled 'An Act to Provide for the Fifteenth and Subsequent Decennial Censuses and to provide for apportionment of Representatives in Congress,' approved June 18, 1929, that the State of Minnesota shall be entitled, in the Seventy-third Congress and in each Congress thereafter until the taking effect of a reapportionment under said act or subsequent statute, to Nine (9), representatives of the Congress of the United States.

"In Witness whereof I hereto affix my name and the seal of the House of Representatives of the United States of America this Fourth Day of March, Anno Domini 1931, in the City of Washington, District of Columbia."

Wm. Tyler Page, Clerk of the House of Representatives of the United States. (Official Seal of the House of Representatives.)

[fol. 4]

VII

That the Congress of the United States is not now in session and has not been called in Special Session.

That on the second day of April, 1931, there was duly introduced in the House of Representatives of the Legislature of the State of Minnesota in the Forty-seventh Session thereof, a bill for an act entitled an act, "To divide the State of Minnesota into nine Congressional Districts" which, as amended, read as follows, and which thereupon became and is now known as House File 1456 to-wit:

Be it enacted by the Legislature of the State of Minnesota:

Section 1. The State of Minnesota is hereby divided into nine Congressional districts, each of which is entitled to elect one representative to the Congress of the United States.

Section 2. The Counties of Houston, Fillmore, Winona, Wabasha, Olmsted, Mower, Dodge, Freeborn, Waseca, and Steele shall constitute the First Congressional District.

Section 3. The Counties of Blue Earth, Faribault, Martin, Watonwan, Brown, Cottonwood, Jackson, Nobles, Rock, Pipestone, Murray, Redwood, Lyon and Lincoln shall constitute the Second Congressional District.

Section 4. The Counties of Washington, McLeod, Sibley, Nicollet, LeSueur, Carver, Scott, Rice, Dakota, Goodhue, and the Fourth Ward of the City of Minneapolis and the villages of Deephaven, Edina, Excelsior, Long Lake, Minnetonka Beach, St. Bonifacius, Island Park, Richfield, St. Louis Park, Tonka Bay, Wayzata, Hopkins, Maple Plain, Morningside, Mound, and the towns of Bloomington, Eden Prairie, Excelsior, Independence, Minnetonka, Minnetrista and Orono in Hennepin County shall constitute the Third Congressional District.

Section 5. The County of Ramsey shall constitute the Fourth Congressional District.

[fol. 5] Section 6. The Town of St. Anthony in Hennepin County and the City of Minneapolis except the Third, Fourth and Tenth wards thereof shall constitute the Fifth Congressional District.

Section 7. The Counties of Anoka, Benton, Sherburn, Stearns, Morrison, Mille Lacs, Isanti, Chisago, Kanabec, Pine, Aitkin, Crow Wing, Cass, Todd, Hubbard and Wadena shall constitute the Sixth Congressional District.

Section 8. The Counties of Grant, Douglas, Traverse, Stevens, Pope, Big Stone, Swift, Lac qui Parle, Chippewa, Yellow Medicine, Renville, Kandiyohi, Meeker, Wright and the Villages of Dayton, Golden Valley, Hanover, Osseo, Rogers, Crystal, Robbinsdale, Brooklyn Center, that part of the Village of Rockford in Hennepin County, and the towns of Brooklyn, Champlin, Corcoran, Dayton, Greenwood, Hassan, Maple Grove, Medina and Plymouth in the County of Hennepin and the Third and Tenth wards of the City of Minneapolis, shall constitute the Seventh Congressional District.

Section 9. The Counties of Koochiching, Itasca, Carlton, St. Louis, Lake and Cook shall constitute the Eighth Congressional District.

Section 10. The Counties of Otter Tail, Wilkin, Clay, Becker, Mahnomen, Norman, Polk, Marshall, Red Lake, Pennington, Kittson, Roseau, Clearwater, Beltrami, and Lake of the Woods, shall constitute the Ninth Congressional District.

Section 11. All acts and parts of acts inconsistent herewith are hereby repealed.

Section 12. This act shall take effect and be in force from and after its passage.

That on April 27, 1931, said Bill for an Act was deposited for filing in the office of the Secretary of State of the State of Minnesota. That a map or maps showing the geographical divisions according to said House File 1456 is filed herewith and hereby referred to and made a part hereof.

[fol. 6] IX

That on the 15th day of April, 1931, the House of Representatives of the State of Minnesota was in session duly assembled and a quorum being present and acting said Bill for an Act last mentioned was duly, then and there, put to a vote, therein, and thereupon a majority of the Representatives voted in favor of said Bill and said Bill was duly passed by said House and then and there so declared.

That on the 20th day of April, 1931, the Senate of the State of Minnesota was in session duly assembled, and thereupon duly received from said House of Representa-

tives said Bill for an Act hereinbefore set forth; and thereupon said Bill for an Act was then and there duly put to a vote therein; and thereupon a majority of the Senate voted in favor of said Bill and said Bill was duly passed by said Senate and then and there so declared.

X

That thereupon said House File 1456 was transmitted to the Governor of the State of Minnesota for the action of said Governor thereon in accordance with law. That on the 20th day of April, 1931, said Governor of said State of Minnesota returned said House File 1456 to the House of Representatives of the Legislature of said State with a veto of the tenor following:

Executive and Official Communications, State of Minnesota, Executive Department

St. Paul, April 20, 1931.

Hon. Oscar A. Swenson, Speaker of the House of Representatives:

Sir: I am returning herewith without my approval H. F. No. 1456, "A bill for an act to divide the State of Minnesota into nine Congressional Districts."

The State of Minnesota must be redistricted but that redistricting should be based upon a fair division of population. H. F. No. 1456 is obviously an inequitable distri- [fol. 7] bution of the population of Minnesota.

There is a difference of 116,000 between the proposed Fifth District, which contains the largest population, and the proposed First District, which contains the smallest population.

Taking the so-called agricultural districts there is a difference of 98,000 between the proposed Seventh District, an agricultural district which contains the largest population of the agricultural districts, and the proposed First District, an agricultural district which contains the smallest population. This is an unfair discrimination between agricultural districts.

Minnesota being an agricultural state is entitled to as much representation in Congress as possible. A plan of reapportionment may easily be worked out which does not

involve any great disparity between agricultural districts as such nor any great disparity between so-called country and so-called city districts; and which will be fair from the standpoint of contiguous territory.

The people of Minnesota are entitled to a reapportionment upon the basis of an equitable distribution of the population, and upon the basis of contiguous territory.

To avoid the confusion of having candidates for Congress from Minnesota running at large I earnestly urge you to work out an equitable plan of reapportionment.

Respectfully, Floyd B. Olson, Governor.

XI

That thereupon said House of Representatives and said Senate took no further action on said bill except as hereafter set forth.

XII

That on the 22nd day of April, 1931, said House of Representatives adopted the following resolution:

Whereas, on the 16th day of April, 1931, the House of Representatives of the State of Minnesota duly passed H. F. No. 1456, a bill for an act to divide the State of Minnesota into nine Congressional Districts; and

[fol. 8] Whereas, on the 20th day of April, 1931, said H. F. No. 1456 was duly passed by the Senate of the State of Minnesota; and

Whereas, said bill is now in the possession of the House,

Now, therefore, be it resolved, That the Chief Clerk of the House be and he is hereby directed to deposit for filing with the Secretary of State the enrolled copy of said H. F. No. 1456, said bill to become and remain part of the permanent records of the office of the Secretary of State.

That *H*ournals of the House of Representatives and the Senate of the Legislature of the State of Minnesota at the Forty-seventh Session thereof contain a full and complete report of the matters hereinbefore stated and are respectively referred to for greater particularity.

XIII

That thereupon the said House File 1456 on the 27th day of April, 1931, without further action by the Senate and/or the House of Representatives of the Legislature

for the State of Minnesota and/or without being presented to the Governor of said State, was deposited for filing in the office of the Secretary of State of the State of Minnesota in accordance with the terms of said resolution.

XIV

That the Legislature of the State of Minnesota adjourned sine die on the 22nd day of April, 1931, is not now in session, and has not been called in Special Session.

XV

That the population of the various congressional districts provided for in said Bill for an Act, said House File 1456, as shown by the Census of the United States for the year 1930, was as follows:

[fol. 9] First congressional district	228,596
Second congressional district	251,734
Third congressional district	291,601
Fourth congressional district	286,721
Fifth congressional district	344,500
Sixth congressional district	301,984
Seventh congressional district	326,391
Eighth congressional district	276,633
Ninth congressional district	253,786

XVI

That as hereinbefore stated, the population of the State of Minnesota on the 1st day of April, 1930, exclusive of Indians not taxed, equalled 2,551,583, and that on the basis thereof, an equal division of the population of the State of Minnesota as above set forth into nine congressional districts would allocate 283,509 inhabitants in each congressional district.

XVII

That at the time of the happenings of the matters hereinbefore set forth, Section 12 of Article 4 of the Constitution of the State of Minnesota provided as follows:

No money shall be appropriated except by bill. Every order, resolution or vote requiring the concurrence of the two houses except such as relate to the business or adjourn-

ment of the same shall be presented to the Governor for his signature and before the same shall take effect shall be approved by him or being returned by him with his objections shall be passed by two-thirds of the members of the two houses according to the rules and regulations prescribed in case of a bill.

That said resolution of the House of Representatives, hereinbefore mentioned, was not presented to said Senate for action in relation thereon or to the Governor of said State for action in relation thereto.

[fol. 10] XVIII

That at all times mentioned, it has been, and now is, one of the duties of said Secretary of State to receive filings of candidates for nomination to the office of representative in Congress from all persons eligible to be candidates thereat; and to refuse such filings for nomination thereto when said persons tendering the same appear to be ineligible. That in connection with said filings at all of said times, it likewise was, and now is, another duty of said Secretary of State to supervise the printing of all necessary ballots for all such congressional elections, primary and otherwise, held therein.

That the expense thereof is great; that the filing fees of said candidates have never been sufficient to cover such expenses; and that the balance of such expense has been paid necessarily from the public treasury.

That under the law of the State of Minnesota at all of said times, it has been, and now is, also the duty of the Secretary of State to give notice of said congressional elections therein including an election for nomination to the office of representative in Congress.

XIX

That as your petitioner is informed and believes divers persons have filed and are now threatening to file with the said Secretary of State for nomination to the office of Representative in Congress from said State of Minnesota; and in connection therewith are designating and threatening to designate a subdivision of the State of Minnesota as a congressional district; that divers other persons have at-

tempted to file with said Secretary of State and are threatening to file for nomination *of* the office of representative in Congress from said State and are failing to designate any one subdivision of said State as a congressional district, and are claiming the right to file for such nomination for the office of representative in Congress at large from the entire State.

[fol. 11]

XX

That great uncertainty exists as to what law is applicable to the matters hereinbefore set forth; and that as your petitioner is informed and believes by reason thereof said Secretary of State of the State of Minnesota, notwithstanding all the matters hereinbefore stated, has accepted and has received the filing of one person as a candidate for nomination to the office of representative in Congress designating a subdivision of said State as a congressional district; and that said Secretary of State has refused to receive the filing of another person as a candidate for the nomination to the office of representative in Congress from the State of Minnesota, designating the entire State of Minnesota as a district; and that by reason thereof, divers suits have been and are about to be commenced in divers courts of the State of Minnesota in relation thereto; and there is bound to arise in said State and in the courts thereof great confusion and a multiplicity of actions, all having for their purpose the determination of what constitutes the law applicable.

That said Secretary of State wrongfully accepted said filing of said person as a candidate for the nomination to the office of representative in Congress designating a subdivision of said State of Minnesota as a congressional district, and as your petitioner is informed and believes unless restrained by the order of this Court will continue to receive similar filings similarly framed all in violation of the Statute in such case made and provided, and all to the great and irreparable injury of all the electors and taxpayers of the State of Minnesota including your petitioner.

XXI

That your petitioner, as a citizen of the United States and as a citizen, elector and taxpayer of the State of Minnesota,

claims herewith a privilege and right in his own behalf and on behalf of all other citizens, electors and taxpayers of [fol. 12] the State of Minnesota, under and by virtue of the acts of Congress hereinbefore referred to in that your petitioner claims the privilege and right, thereunder, to be represented in the Congress of the United States by nine representatives in Congress, duly elected by the electors of said State, from nine separate congressional districts therein, duly established by the legislature of the State of Minnesota, in accordance with and as provided by law; and further claims the right and privilege under said acts of Congress last mentioned to have each said nine congressional districts contain as near as practicable an equal number of inhabitants, and that said congressional districts shall be composed of a contiguous and compact territory.

XXII

That your petitioner is informed and believes said House File 1456 is invalid, is not an Act of the Legislature of the State of Minnesota, and is of no force or effect and null and void for the reason among others that said House File 1456 was duly and legally vetoed by the Governor of the State of Minnesota as hereinbefore set forth and never repassed by said Legislature as required by law.

XXIII

That the validity or invalidity of said House File 1456, directly affects each citizen, elector and taxpayer of the State of Minnesota.

XXIV

That a final determination of this action will settle and determine the questions herein presented and all questions which can be presented with reference to the receiving or rejecting of filings for nomination to the office of Representative in Congress from the State of Minnesota, and the giving of proper notices of election thereunder by said Secretary of State of the State of Minnesota.

[fol. 13] XXV

That your petitioner, as a citizen and elector, claims the privilege on his own behalf and on behalf of all other citi-

zens and electors of the State of Minnesota to be represented in the Congress of the United States by a Representative in Congress duly and legally nominated and elected to such office under and by virtue of the Constitution of the United States; the Acts of Congress applicable thereto; the Constitution of the State of Minnesota; and the laws of the State of Minnesota duly and legally enacted in respect thereto.

XXVI

That said House File 1456 is invalid and void in that it violates the direction of the Congress of the United States in two respects: (1) that said proposed congressional districts as named in said House File 1456 are not compact; (2) that said proposed congressional districts provided for in said House File 1456 do not contain an equal number of inhabitants as nearly as practicable.

XXVII

That your petitioner and all citizens, electors and taxpayers of the State of Minnesota are parties interested in this matter and have no speedy, sufficient or adequate remedy at law or in the due course of law; and that in the interest of all said citizens, electors and taxpayers, a speedy hearing and determination of the matters herewith presented is necessary to the welfare of the public; that an exigency exists in regard hereto in that the determination of this proceeding may necessitate the calling of the Legislature of said State in Special Session.

Wherefore, your petitioner prays that this Court declare invalid any and all filings for the nomination to [fol. 14] the office of Representative in Congress in the State of Minnesota designating a subdivision of the said State as a congressional district; enjoin said Secretary of State from receiving any filings for the office of Representative in Congress in the State of Minnesota which designate a subdivision of said State as a congressional district; and enjoin said Secretary of State from giving any notice of the holding of elections for the office of Representative in Congress in the State of Minnesota designating a subdivision of said State as a congressional district,

and for such other, further and different relief as to the court may seem just and proper.

(Signatures of Counsel.)

(Verification.)

IN DISTRICT COURT OF RAMSEY COUNTY

DEMURRER TO PETITION

The respondent demurs to the petition and alternative writ herein, upon the ground that the facts stated therein do not constitute a cause of action against the respondent.

Dated at St. Paul, Minnesota, this 12th day of May, 1931.

(Signatures of Counsel.)

IN DISTRICT COURT OF RAMSEY COUNTY

ORDER SUSTAINING DEMURRER

This matter came on for hearing before this Court at a Special Term held on the 16th day of May, 1931, in the Court House, in Ramsey County, Minnesota, on the demurrer of the respondent to the petition of the petitioner and relator.

The petitioner appeared in person and by George T. Simpson and John A. Weeks, his attorneys; and respondent appeared by Henry N. Benson, Attorney General of the State of Minnesota, and W. H. Gurnee, Assistant Attorney General.

[fol. 15] After hearing the arguments and upon all the files, records and proceedings herein, it is

Ordered, that said demurrer be sustained.

Dated June 12, 1931.

Gustavus Loeginger, Judge of the District Court.

(Stay of 30 days.)

(The Memorandum of the Trial Court attached to the preceding Order is set out in Appendix "C" herein.)

IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL FROM ORDER

To Henry N. Benson, Attorney General, for the above-named respondent, and to N. C. Robinson, Clerk of said District Court:

Please take notice that the above named W. Yale Smiley, appellant, appeals to the Supreme Court of the State of Minnesota, from the order of said District Court entered herein on the 11th day of June, A. D. 1931, sustaining the demurrer of Mike Holm, the respondent to the petition of the appellant and from each and every part and from the whole thereof.

Dated this 15th day of June, 1931.

(Stipulation waiving bond filed.)

(Signatures of Counsel.)

(Title)

OPINION SUSTAINING ORDER OF TRIAL COURT

The opinion and order of the Supreme Court appears in Volume 238 N. W. 494, — Minn. —, and is quoted verbatim in Appendix "B", hereto attached.

[fol. 16] IN DISTRICT COURT OF RAMSEY COUNTY

JUDGMENT OF DISMISSAL—Filed Oct. 19, 1931

The above entitled action being regularly upon the special term calendar for argument upon the demurrer of the respondent to the complaint of the petitioner and relator, came duly on for hearing before the court, Hon. Gustavus Loevinger, judge thereof, on the 16th day of May, 1931.

George T. Simpson, Esq., and John A. Weeks, Esq., appeared for the petitioner and relator, and Henry N. Benson, attorney general, and W. H. Gurnee, assistant attorney general, appeared for the respondent,

The matter having been argued and submitted to the court, and the court having on June 12, 1931, made an order sustaining the demurrer of the respondent to the complaint and petition of the petitioner and relator, and the petitioner and relator having failed to amend his complaint;

Now therefore, pursuant to said order, and on motion of the attorney general,

It is ordered, adjudged and decreed that said action be dismissed upon the merits, and that the respondent have judgment against the petitioner and relator for the sum of $12.00, costs and disbursements as taxed and allowed herein.

N. C. Robinson, Clerk of the District Court, by John A. Hanggi, Deputy.

[File endorsement omitted.]

IN DISTRICT COURT OF RAMSEY COUNTY

NOTICE OF APPEAL FROM JUDGMENT

To Henry N. Benson, Attorney General and attorney for the above-named Mike Holm, as Secretary of State, and to N. C. Robinson, Esq., Clerk of said District Court:

[fol. 17] Please take notice that the above named Petitioner and Relator hereby appeals to the Supreme Court of the State of Minnesota, from that certain judgment of the said District Court entered herein, on the 19th day of October, A. D. 1931, and from each and every part, and from the whole thereof.

Dated this 22nd day of October, A. D. 1931.

(Signature of Counsel.)

(Proof of service.)

IN SUPREME COURT OF MINNESOTA

OPINION SUSTAINING JUDGMENT

PER CURIAM:

The appeal is from a judgment. The case was here before and our opinion filed October 9, 1931. The questions involved in this appeal are the same as those involved in

the former appeal. They seem to be identical. For reasons given in the previous opinion and upon authority of that opinion the judgment from which this appeal was taken is affirmed.

[fol. 18] IN SUPREME COURT OF MINNESOTA

28825

THE STATE OF MINNESOTA Upon the Relation of W. YALE SMILEY, Relator,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, St. Paul, Minnesota, Respondent

JUDGMENT—Filed Nov. 17, 1931

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Ramsey, be and the same hereby is in all things affirmed, and that this judgment is final judgment in this cause in this court.

Dated and signed Nov. 17th, 1931.

By the Court. Attest: Grace Kaercher Davis, Grace Kaercher Davis, Clerk.

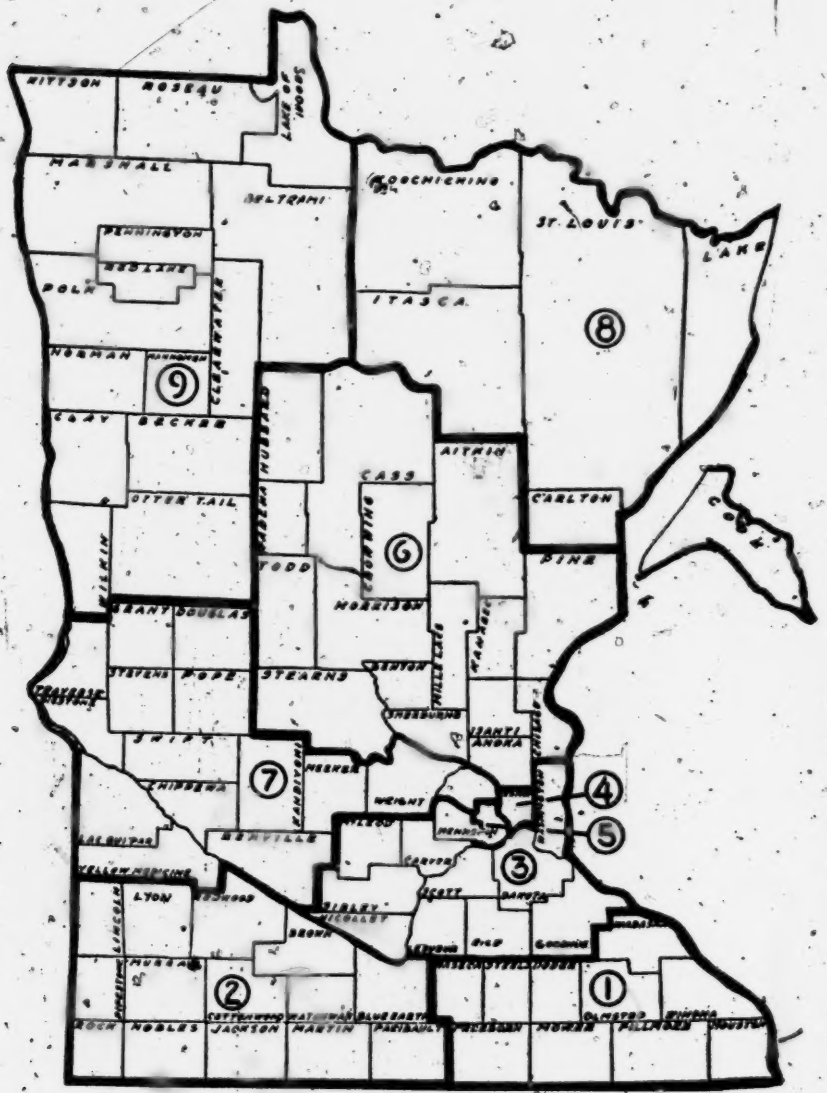
[File endorsement omitted.]

Clerk's certificate to foregoing paper omitted in printing.

[fol. 19] EXHIBIT "A"

STATE OF MINNESOTA:

Showing Congressional Districts under House File 1456

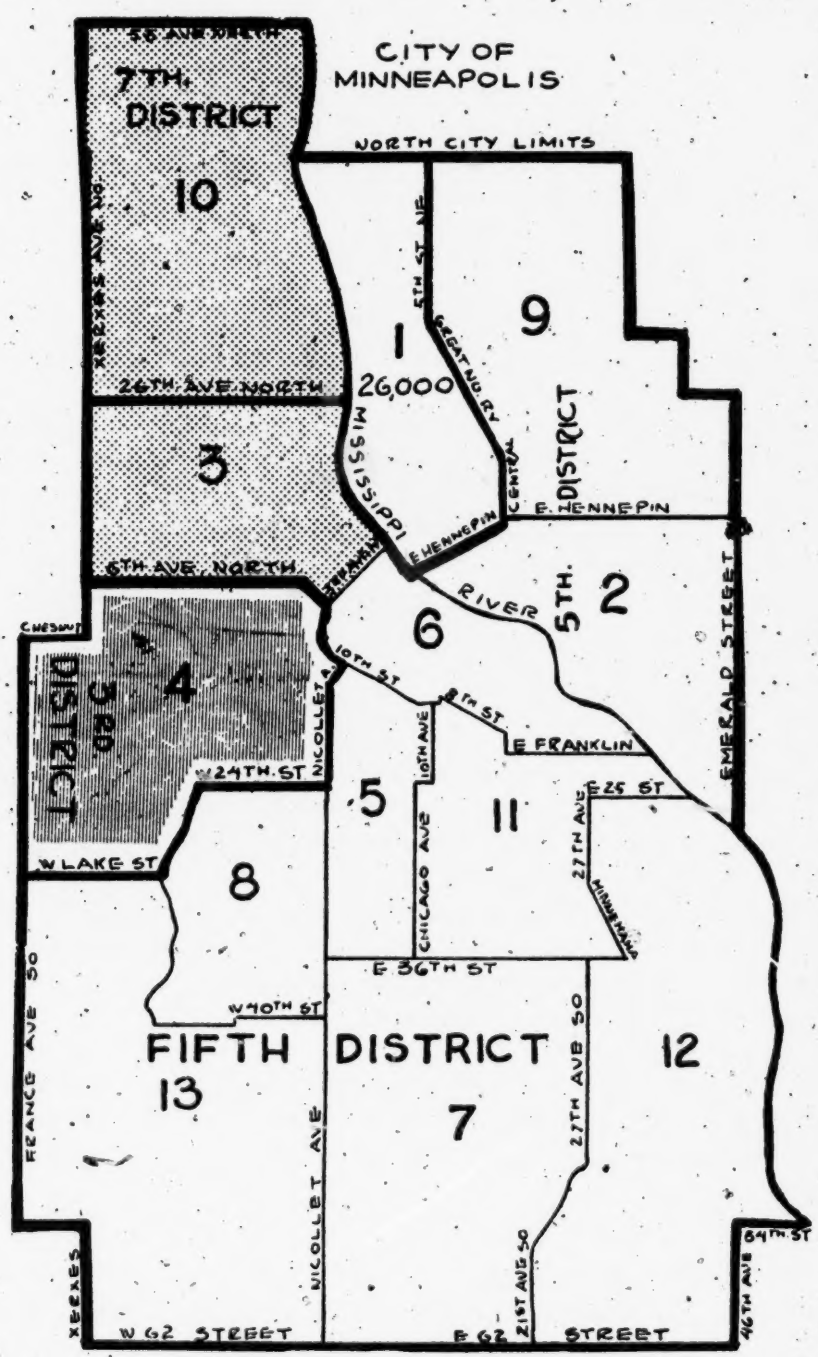


These maps show how Minnesota is divided into nine congressional districts and how Minneapolis is cut into three parts under the reapportionment act held valid by the state supreme court Friday. The map at left shows the state division. Under the act, as shown in the map at right the major part of Minneapolis comprises the fifth district, with the fourth ward a part of the new third district, and the tenth and third wards in the new seventh district, which extends westward to the state border. The reapportionment by the last state legislature was upheld by Judge Gustavus Loevinger of St. Paul in June, and the supreme court Friday confirmed his decision.

[fol. 20] EXHIBIT "B"

CITY OF MINNEAPOLIS:

Showing Congressional Districts under House File 1456



(Numerals indicate wards)

Wards 10 and 3 in 7th Congressional District.
Ward 4 in 3rd Congressional District.
All other wards in 5th Congressional District.

[fol. 21] EXHIBIT "C"

Memorandum of Trial Court on Demurrer

Prior to the fifteenth census, the state of Minnesota was entitled to 10 representatives in congress and had been divided into 10 congressional districts, in each of which one representative was elected. Under the fifteenth census taken in 1930 and the provisions of the congressional act of June 18, 1929, section 22-a, the number of representatives in congress from Minnesota was reduced to nine. The state legislature in April, 1931, in the usual manner passed a bill for an act, known as House File No. 1456, dividing Minnesota into nine congressional districts, from each of which a representative in congress was to be elected in the next congressional election.

When this act was presented to the governor for his approval or disapproval he returned it to the legislature with his veto, because of its alleged inequalities. The legislature as a whole took no further action, but the house of representatives passed a resolution ordering the bill to be filed with the secretary of state as a part of the permanent records of his office.

The secretary of state received and filed the act of the legislature, treating it as valid legislation, and received the filing fee of a candidate from one of the congressional districts for election as representative.

The petitioner herein attacks the act as invalid and seeks to enjoin the secretary of state from accepting any more filing fees and to compel him to return the filing fees already received. The secretary of state demurs to the petition.

Article I, section 4 of the federal constitution reads:

"The times, places and manner of holding elections for senators and representatives shall be prescribed in each

state by the legislature thereof; but congress may at any time by law make or alter such regulations except as to the places of choosing senators."

Article 4, section 1 of the Minnesota state constitution reads:

"The legislature shall consist of the senate and house of representatives which shall meet biennially at the seat of government of the state."

Article 4, section 11 and 12, of the Minnesota state constitution provide:

Every bill which shall have passed the senate and house of representatives in conformity to the rules of each house and the joint rules of the two houses shall, before it becomes a law, be presented to the governor of the state. If he approves, he shall sign and deposit it in the office of the secretary of state for preservation and notify the house where it originated of the fact; but if not, he shall return it with his objections to the house in which it shall have originated.

Thereafter, the legislature shall proceed to reconsider the bill, and if, after such reconsideration, two-thirds of the legislature approve of the bill, it shall become a law. It is further provided:

"Every order, resolution or vote requiring the concurrence of the two houses (except such as relate to the business or adjournment of the same), shall be presented to the governor for his signature, and before same shall take effect shall be approved by him or, being returned by him with his objections, shall *he* repassed by two-thirds of the members of the two houses according to the rules and limitations prescribed in case of a bill."

[fol. 22] Article 4, section 23 of the Minnesota state constitution reads:

"The legislature shall provide by law for an enumeration of the inhabitants of this state in the year 1865 and every tenth year thereafter. At their first session after each enumeration so made, and also at their first session after each enumeration made by the authority of the United

States, the legislature shall have the power to prescribe the bounds of the congressional, senatorial and representative districts, and to apportion anew the senators and representatives among the several districts according to the provisions of section second of this article."

Article 4, section 2, relates to the apportionment of representation in the two houses composing the state legislature, but is not pertinent to the issues involved in this litigation.

On August 8, 1911, congress, pursuant to its authority under article I section 4 of the federal constitution, enacted a law requiring that the states be redistricted under the thirteenth census, being the census of 1910, "in the manner provided by the laws thereof" in contradistinction to the phrase used in the federal constitution, "by the legislature thereof."

The redistricting act, as passed by the Minnesota legislature, instead of so dividing the state that the congressional districts shall be contiguous and compact, and that each of them shall contain approximately 283,000 inhabitants, provided that the fifth congressional district, including portions of the city of Minneapolis shall contain a population of 344,500, the seventh congressional district shall contain 326,391, whereas the first congressional district contains only 228,596. It is also claimed that territorially the districts are not "compact."

Shall the demurrer be sustained. The answer involves a determination (1) whether the word "legislature" as used in article 1, section 4, of the federal constitution means merely the members meeting at a stated time as contemplated by article 4, section 1, of the state constitution, or whether it means the entire legislative power of the state including the power of the governor to veto and the the consequent invalidity of any law not passed over his veto by a majority of two-thirds; (2) whether under article 4, section 23, of the state constitution the power to redistrict the state into congressional districts is specially conferred upon the state legislature and that the general provisions in article 4, sections 11 and 12, as to the governor's veto do not apply; (3) whether or not the congressional act of August 8, 1911, or any part of it is still in force and applicable; and (4) whether the alleged numerical and territorial

inequalities in house file No. 1456, also known as the redistricting act, authorized the court in declaring it null and void.

It is the contention of Petitioner Smiley, a citizen, taxpayer and voter, that the redistricting act is invalid because after its veto by Governor Olson the state legislature failed to pass it over his veto by the two-thirds vote required for the validity of all state legislation which has been vetoed under the state constitution, article 4, sections [fol. 23] 11 and 12.

This conclusion is based upon the claim, first, that the term "legislature" as used in article 1, section 4, of the federal constitution means the legislative power of the state as constituted under the state constitution, including not only the bicameral deliberative body ordinarily called the legislature but also the governor when he is a part of the legislative power through the veto and including the people themselves when by initiative or referendum they participate in the exercise of legislative power; and, secondly, that the act of August 8, 1911, is still in force and requires any redistricting act in Minnesota to be enacted according to the laws of Minnesota. He contends, further, that the inequalities in the redistricting act are so great that the court is authorized to and should declare it null and void.

The respondent, Mike Holm, secretary of state, appearing by the attorney general of the state, contends that the redistricting act is in full force and effect, for the reasons that, first, the term "legislature" as used in the portion of the federal constitution under examination applies to the body created and described in article 4, section 1, of the state constitution as the legislature; secondly, that the redistricting of the state for congressional elections is a special power vested exclusively in the state legislature by article 4, section 23, of the state constitution and is not subject to gubernatorial veto; thirdly, that the congressional act of August 8, 1911, is no longer in force; and, fourthly, that the alleged inequalities in the redistricting act present a political or legislative but not a judicial question.

1. The word "legislature" is used 11 times in the federal constitution and five times in its amendments. In the following instances the context leaves scarcely any room for

doubt about meaning attached to the term; the bi-cameral body, holding sessions periodically, seems to be indicated:

(1) Article I, Sec. 2, Cl. 1, and (2) Amendment XVII, Cl. 1, providing that the qualifications for electors for representatives in congress and for United States senators, respectively, shall be the same as the qualifications for electors in state elections for members of the most numerous branch of the state legislature;

(3) Article I, Sec. 3, Cl. 2, and (4) Amendment XVII, Cl. 2, providing, respectively, in the former that the executive may appoint a senator to fill a vacancy until the next meeting of the legislature and in the latter he may fill the vacancy if empowered by the legislature until the people fill it by an election;

(5) Article IV, Sec. 3, providing that the United States shall protect each state against domestic violence on the application of the legislature or of the executive (when the legislature cannot be convened);

(6) Article VI, Cl. 3, requiring that the members of the several state legislatures shall be bound by oath to support the federal constitution, and (7) Amendment XIV, Sec. 2, and (8) Sec. 3, referring to members of state legislatures.

In addition to the foregoing, the case of Hawke vs. Smith, 253 U. S. 221, 231, 40 S. Ct. 405, 408, 64 L. Ed. 871, enumerates the following uses of the word "legislature" as having reference to the bicameral body and not to the legislative power of the state.

(9) Article I, Sec. 3, Cl. 1, providing for the choosing of United States senators by the legislature of the states;

[fol. 24] (10) Article I, Sec. 8, Cl. 17, providing for the purchase by the United States of places for public purposes by the consent of the legislatures of the states in which the same shall be;

(11) Article IV, Sec. 3, Cl. 1, providing that no state shall be formed by the junction of two or more states or parts of states without the consent of the legislatures of the states concerned;

(12) Article V, providing for the ratification of amendments to the federal constitution by state legislatures.

The word "legislature" appears in four other places in the federal constitution and its amendments.

(13) Article V, in addition to providing for the ratification of an amendment to the constitution by the legislatures of three-fourths of the several states, also provides in the same sentence that congress, on the application of the legislatures of two-thirds of the several states shall call a convention for proposing amendments. The language and the purpose of these two provisions, the one bearing on the application by the legislature for a convention to frame proposed amendments, and the other on the ratification by the legislature of the proposed amendments, are so similar, the only difference being that the former requires only two-thirds of the legislatures while the latter calls for three-fourths of the legislatures, it seems super-ogatory to say that the term "legislature" must mean the same in both parts of this article. Any other construction is not likely to be claimed.

(14) Article II, section 1, Cl. 2, of the federal constitution, reads:

"Each state shall appoint, in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in the congress."

These electors are to elect the president. This clause was under consideration in two cases, Re Opinion of the Justices (Me.), 107 Atl. 705, 5 A. L. R. 1407, and McPherson vs. Blacker, 146 U. S., 1, 36 L. Ed. 869.

The precise point in the Maine case was whether an act of the legislature granting women the right to vote for presidential electors was within the operation of a constitutional amendment requiring submission to the voters, upon request, of any act, bill, resolve or resolution passed by the legislature. This involved the construction of the term "legislature" as used in this portion of the federal constitution.

The justices of the state of Maine held that the clause there being considered clothed each state with the absolute power to appoint electors in such manner as it may see fit without any interference of control on the part of the federal government, and that the clause "in such manner as

the legislature thereof may direct'' simply means that the state shall give expression to its will as it must of necessity through its law-making body, the legislature.

And it further held that the act of the legislature must be passed and become effective in accordance with and in subjection to the constitution of the state, like all other acts and resolves having the force of law.

[fol. 25] Although this is the pivotal point in the case, it is not supported by the citation of any authorities nor amplified by reasoning. The opinion is not persuasive. The effect of the opinion is that the term ''legislature'' as used in Article II, section 1, Cl. 2, is struck out and the word ''state'' is substituted. It holds that the use of the expression ''in such manner as the legislature thereof may direct'' is not a limitation on the power of the state to control the legislature. It makes use of — words meaningless and surplusage.

In the second case in which this clause of the constitution was under scrutiny, the McPherson case cited above, the question was whether the legislature of the state of Michigan could direct that presidential electors be elected from district- coterminous with congressional districts or whether they had to be appointed at large. On the one hand, it was claimed that since the appointment was made by the state, it had to act as a political entity on each elector and the provision for election from districts was in violation of Article II, Sec. 1, Cl. 2. In opposition thereto it was claimed that since the appointment was to be made as the legislature directed, its discretion was unlimited. The supreme court in the course of its opinion said (36 L. Ed. at P. 874):

''The clause under consideration does not say that the people or the citizens shall appoint, but that 'each state shall'; and if the words, 'in such manner as the legislature thereof may direct' had been omitted, it would seem that the legislative power of appointment could not have been successfully questioned in the absence of any provision in the state constitution in that regard. Hence, the insertion of these words, while operating as a limitation upon the state in respect of any attempt to circumscribe the legislative power cannot be held to operate as a limitation on that power itself.''

The determination of the issues in the McPherson case did not require a definition or interpretation of the term "legislature" as there used, but it did decide that the use of the word "legislature" was not surplusage; that ordinarily the legislature has unlimited legislative power and if there is nothing in the state constitution to the contrary the act of the legislature is the act of the state through its legislative power; and it seems to hold that the insertion of the phrase, "in such manner as the legislature thereof may direct" is not a limitation on the power of the legislature but is a limitation on the state in respect to any attempt to circumscribe the legislative power of the legislature, by constitutional limitations on that power.

The opinion of the justices of Maine is not in harmony with the apparent holding of the United States supreme court in the McPherson case. The latter case is not only controlling as authority but is sounder in its reasoning.

(15) Attention is also called to Amendment XVII, Cl. 2, in which an election to fill a senatorial vacancy is contemplated "as the legislature may direct." In the first clause of this amendment the word legislature from the context defines itself. In the second clause the juxtaposition of "legislature" and "executive" certainly gives strong color to the view that the word "legislature" is used in its obvious and organic sense.

The deliberate choice of the words "the legislature of any state," rather than the words "the state" or the words "the state by law" tend to show that the legislature and not the legislative power is meant. Hence, one must con- [fol. 26] clude that the term "legislature" used in the last line of the same clause can hardly have been used in any different sense. Nor should it be forgotten that the XVIIth Amendment came in response to a demand for the popular election of senators after the courts had declared that under Article I, Sec. 3, Cl. 7, of the federal constitution, providing for the election of senators by state legislatures, the power of the state legislature was exclusive and not subject to the control of state constitutions.

(16) This disposes of all references to the state legislature in the federal constitution adversely to the claims of petitioner except Article 1, Sec. 4, Cl. 1. This clause was construed in two state and one federal decision. The first

in point of time was the case of state ex rel. Schrader vs. Polley, (1910) 26 S. D. 5, 127, N. W. 848. In that case the question involved was whether a redistricting act passed by the legislature of the state of South Dakota was valid before it was submitted by referendum to the people as required by the constitution of the state.

The court held that the act of the legislature was not valid until it was so submitted. It placed its opinion upon the ground that the redistricting act of the state legislature is in all things the same as any other law, that it is subject to the same constitutional limitations as to the manner of passage, approval, veto, and referendum as any other law that may be passed by the legislature.

It bases its decision upon the opinion that no power to divide the state into congressional districts was ever delegated to the legislature of the state by Article I, Sec. 4, of the federal constitution. It holds that this clause of the constitution does not delegate the power to the state legislature or to the state itself to regulate such elections because the state already in its sovereign capacity possessed that power and that the federal constitution simply left that power with the state where it already reposed.

The court goes farther and holds that the world legislature as used in this part of the constitution does not mean simply the members who compose the legislature acting in some ministerial capacity, but refers and means the law-making body or power of the state as established by the state constitution and which includes the whole constitutional law-making machinery of the state.

It appears to this court that the learned supreme court of South Dakota erred in assuming that a state legislature in providing for the time, place and manner of electing representatives in congress is exercising a power reserved to the people of the state of South Dakota and inherent in them without regard to the grant of power in the federal constitution.

There can be no inherent power in the people of South Dakota to legislate for any one except themselves. There can be no inherent power in the people of the state to adopt a federal constitution or to amend the federal constitution which is to govern the inhabitants of other states and territories. As a matter of fact, that constitution may be amended and they may be subjected to the effects of such

amendment without their consent and contrary to their expressed wishes.

[fol. 27] The representatives in congress are officers of the federal government. They legislate for all the people of the United States. They govern the District of Columbia, the territory of Alaska and the island possessions of the nation. It does not sound plausible that any state may claim that it has inherent power or control over legislative, executive or judicial officers who are performing exclusively federal functions.

The state does not have inherent power to determine who shall vote in a federal election, whether it be for president, senators or representatives. The right to vote in such an election is derived from the federal constitution exclusively. The federal government determines the term of office, the duties, powers and rights and the compensation of senators and representatives. It determines their apportionment to the several states. It is a federal election to choose federal officers by federal electors. Ex. p. Yarbrough, 110 U. S., 651, 28 L. Ed. 274; Felix vs. U. S., 186 Fed. 685.

Congress has already fixed the time for congressional elections. U. S. C. A. title 2, Sec. 7. Nothing is left to the states except through their legislatures to fix the places of election. As in the case now before the court, so in the Schrader case, this was done by districting the state. It does not seem to be either an inherent and reserved power of the people of the state nor does it appear to be state legislation subject to the state constitution.

The same clause came up for judicial consideration next in Ohio, in State ex rel Davis vs. Hildebrandt, 94 Ohio, St. 114 N. E. 55. The question there involved the validity of a redistricting act duly passed by the state legislature, approved by the governor but rejected by the people in a referendum vote.

The supreme court of Ohio held the act invalid upon two grounds first, that under the congressional act of August 8, 1911, the redistricting of states under the thirteenth census was to be done "in the manner provided by the laws thereof." U. S. C. A. Title 2, Sec. 4; and, secondly, that the expression "legislature," as used in Article I, Sec. 4, of the federal constitution meant the legislature of the state subject to all the provisions and limitations of the state con-

stitution including the governor's veto and popular referendum.

The reasoning upon the second point was similar to the Schrader case and other cases referred to and overruled by Hawke vs. Smith, 253 U. S. 220, 64, L. Ed. 871, 10 A. L. R. 1504. The case was appealed to the United States supreme court. Ohio ex rel Davis vs. Hildebrandt, 241 U. S. 565, 60 L. Ed. 1172. The supreme court of the United States decided this case on three grounds.

(1) The decisions of the state supreme court on what constituted valid legislation under the state constitution and laws was conclusive on the federal supreme court; (2) the attack upon the decision of the state supreme court holding the state redistricting law to be invalid because not passed as required by the congressional act of August 8, 1911, is without merit; and (3) the contention that to include the referendum within the state legislative power for the purpose of apportionment is repugnant to Article I, section 4, even if sanctioned by congress, because based on the assumption that the referendum annihilates representative government is without substance.

[fol. 28] It is clear that this case does not undertake to define the meaning of the term "legislature" as used in Article I, section 4, nor does it decide that under this section, in the absence of congressional regulation, a redistricting of the state under a congressional re-apportionment by the state legislature is void unless done in accordance with the state constitutional requirements. All that was actually involved and decided so far as pertinent here is that the congressional act of August 8, 1911, directed the state to be redistricted according to state laws rather than by the state legislature and that the attempted redistricting of the state of Ohio by the state legislature was ineffectual because not done according to its legal requirements.

The clause now under discussion came under the judicial eye of the United States supreme court again a little later in the case of Hawke vs. Smith above referred to. The court referred to Article I, section 4, in order to answer the argument that the Hawke vs. Smith case in holding that the state legislature, unhampered by state constitutional provisions, has the exclusive power to ratify an amend-

ment to the federal constitution was inconsistent with the Davis vs. Hildebrant case.

The opinion points out that the two cases are inapposite. The Davis vs. Hildebrant case construed an act of congress. The act itself, it was pointed out, recognized the referendum as part of the legislative authority of the state for the purpose stated. The constitutionality of the Ohio law was conceded.

No case has been called to the court's attention or been found by the court after diligent search in which the word "legislature" as used in any state constitution or in any state or federal law was ever construed as meaning the legislative power of the state or the entire legislative machinery of the state.

Those cases which construe the word "legislature" as used in the federal constitution to mean the legislative power of the state do it upon the theory either that the power exercised is not dependent on the federal constitution but is a power reserved to and inherent in the people of the state to be exercised as they see fit (Schrader vs. Polley) or that whenever the legislature acts, whether under state or federal authority, it can act only in the manner contemplated by the state constitution from which alone it gets its potency. (State vs. Hildebrant, 114 N. E. 55).

The untenability of both these views is conclusively established in the Hawke vs. Smith case by the U. S. Supreme Court, unless an inference may be drawn that the framers of the constitution used the word in two different senses and a distinction can be made between its use in Article I, section 4, and perhaps Article II, section 1, and its use in other parts of the constitution. It is claimed this very distinction was made in Hawke vs. Smith, 253 U. S. 220, in the following language:

"Article I, section 4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the constitution as to the expression or assent or dissent to a proposed amendment to the constitution. In such expression no legislative action is authorized or required."

It is contended on behalf of petitioner that by this language the supreme court of the United States distinguishes

between the use of the word legislature in Article V and its use in Article I, section 4, and construes the latter as the equivalent of the legislative power of the state, while the former means the bicameral body.

[fol. 29] It is quite true that in ratifying an amendment the legislature frames no legislation, an affirmative vote has no effect unless and until a sufficient number of other legislatures have concurred, and the effect of the amendment is not limited to the geographical jurisdiction of the legislature, whereas in prescribing the places of a congressional election the legislature not only votes but frames the legislation, its affirmative vote is at once effective and its effect is limited to the state. But this functional distinction does not hold good as to powers given to or duties put upon the state legislature in other parts of the constitution.

Thus, in applying to congress for a constitutional convention in consenting to the sale of land to the government and in consenting to the forming of a new state out of portions of its own territory it must draft appropriate legislation, must deliberate upon it, must vote upon it and to some extent at least its actions go into effect at once and are limited in territorial consequences to their own states.

In all these respects, as well as in directing how a senatorial election shall be held, it is legislating. But why should not the legislature legislate in performing federal powers or functions? Is it to be assumed that the framers of the constitution used the word "legislature" in its obvious and legally proper sense when they wanted it to perform non-legislative functions but as soon as they imposed on it functions more nearly legislative they did not mean the legislature at all?

As a matter of fact, the language of the supreme court last above quoted is technically correct, for if the entire fourth section of Article I be construed in the light of legislative power granted not only to the state legislature but also to congress the result is ample power in the state to legislate. But the statement there made must be construed with reference to the subject under discussion, namely, the situation in the case of State vs. Hildebrandt, as distinguished from the situation in the case of Hawke vs. Smith. In the latter the act of the legislature was clearly dis-

tinguishable from legislation and hence not comparable to a legislative act of redistricting. But it does not follow because a "state" has the legislative power to enact a redistricting measure "within the limitations" of article I, sec. 4, that the word "legislature" as there used means the legislative power of the state, or that the court intended to be so understood.

That in many places the constitution uses the word "legislature" in its organic, bicameral sense, is established textually and judicially. Before the court can reach the conclusion that the same word was used in a fundamentally different sense in one or two instances in the same instrument, something more than a mere difference in the character of the services to be performed should appear. The intent should be apparent from the instrument. It should not be necessary to be read into it by a process of interpretation and interpolation.

[fol. 30] Another coincidence which ought to be given weight is the fact that article I, section 4, requires the legislature in the same clause and by the same grant to prescribe the times, places and manner of "holding elections for senators and representatives." But the legislature alone, unhampered by state constitutions, voted for senators. Naturally, it alone was interested in the time, place and manner of exercising its power of voting for senators. Not even congress could tell the legislature at what place it should vote for senators.

Yet, if the contention of the petitioner is sound, then the constitution uses the same word at the same time in two senses, in the sense of the legislature when it fixes the place or the time or the manner for its vote on senators, and in the sense of the legislative power of the state when it fixes the time, the place or the manner of voting for representatives. The result once more demonstrates the difficulties in which the court becomes involved when it attempts to "interpret" a term contrary to its plain, usual and obvious meaning.

As a further aid to interpretation, it may be well to check the soundness of the theory that the framers of the constitution used the term "legislature" in its usual and obvious sense by an examination of the entire instrument.

U. S. vs. Morris, 1 curt. 23, 26 federal cases No. 15815; McPherson vs. Blacker, 146 U. S. 1, 13, S. ct. 3, 36, L. Ed. 868. The framers of the constitution referred to numerous rights to be exercised through various agencies.

They made use of the congress, the legislature, the executive, the state, and did not fail to refer to "appropriate legislation by the state." There is no internal evidence that they used any of the terms employed inadvertently, inaccurately or superfluously. Holmes vs. Jennison, 14 Pet. 540, 10 L. Ed. 579. On the contrary, it has been called "an instrument of exact expression." Myers vs. U. S., 272 U. S. 52 (p. 233), 71 L. Ed. 160 (p. 214, subd. XVII. Upon this assumption every word and phrase must be given effect. Blake vs. McClung, 172 U. S. 239, 19 S. Ct. 165, 42 L. Ed. 432; Knowlton vs. Moore, 178 U. S. 41, 20 S. Ct. 474, 44 L. Ed. 969.

Thus, as the appropriate agency designated by the federal constitution, the legislature shall "choose" federal senators, "fill" senatorial vacancies, "prescribe" the time, place and manner of holding elections for senators and representatives, and "direct" how the state shall appoint presidential electors. In the same capacity the legislature may "apply" to the United States for protection against domestic violence, "apply" to congress to call a constitutional convention, "ratify" an amendment to the federal constitution "consent" to the purchase of land from the state by the United States, "consent" to the formation of a new state out of portions of its own territory.

But if a criminal escape from one state to another, the state harboring him must deliver him upon the demand of the executive of the state from which he fled (Article IV, Section 2, Cl. 3); if a vacancy occurs in representation from any state, the executive authority shall call an election to fill it (Article I, Section 2, Cl. 4); if a vacancy occurs in the senate, the executive may make temporary appointment (Article I, Section 3, Cl. 2); if the legislature cannot be convened, the executive may ask for protection against domestic violence (Article IV, Section 4).

[fol. 31] And by contrast, when a state cedes territory to the United States (Article I, Section 8, Cl. 17) or when it consents to surrender its equal representation in the senate (Article V), it acts in its corporate or full legislative capacity. So must the original states have acted

prior to 1808 when they admitted the importation of such persons as they thought proper," Article I, Section 9. Each state reserves to itself authority to train and to appoint the officers of the state militia (Article I, Section 8, Cl. 16). Amendment XVIII may be enforced by the state "by appropriate legislation." A state may ratify an amendment to the constitution by a convention (Article V) as well as by the legislature, although neither the state, nor its executive, nor a convention, but only "the legislature" may request that amendments be proposed. On the other hand, the restrictions or prohibitions put upon a state are never directed to its legislature or its executive but upon the state in its entire corporate capacity.

Moreover, it would seem as if the framers of the constitution, wherever it was likely that the federal government would come in frequent contact with the state government or wherever it delegated or relied upon a state for the performance of one of the objectives of the union, specified the agency within the state with which it would deal or on which it relied.

As vacancies in the congress ought to be filled promptly, both the executive and the legislature were charged with duties and powers to fill them. The government might often need grounds for public purposes within a state. The constitution designated the legislature as the party to deal with. The relationship was different where the state ceded territory to the United States, hence no such designation. Since a special electorate was to elect the national president, a most important task, a special agency, the legislature was nominated to direct how the state was to appoint such electors.

The establishment of justice required the unquestioned right of extradition. Hence, the proper state agency to demand a fugitive was designated, namely, the executive. It is interesting to note that if a slave escaped, merely his owner might make the demand for his surrender. (Article IV, Section 2, Cl. 3.) Another important purpose of the Union was domestic tranquility; hence, the naming of the legislature and the executives as the proper parties to apply to for aid against domestic violence.

That amendments to the constitution would be proposed was forecast. The national government would be

vitally interested in knowing with whom it is dealing. Hence, Congress might refer the matter of ratification to state legislatures or direct the calling of state conventions. Loyalty to the federal government is of prime importance. The federal constitution was the supreme law. Positive duties were placed on the state legislature, the state executive and the state judiciary under it.

Hence, they were all required to take an oath to support it. (Article VI.) Nothing with reference to federal elections was left exclusively to the states. It was too important to the life of the nation. Hence, the agency to prescribe the times, places and manner of electing senators and representatives was definitely fixed as the state legislature. But lest it fail to act or act ill-advisedly, congress, as in a number of other instances, was given supervision and control. Article 1, Section 4, Cl. 1. (See for similar provision Article 1, Section 10, Cl. 2.)

[fol. 32] Another reason presents itself why the constitution makers carefully and clearly designated the state agency to perform specified functions, free from local or popular interference or control.

The founders of the government had but lately emerged from a war against a tyrannous sovereign in the shape of a king. They were intent on establishing a government in which through checks and balances tyranny would be impossible. They were creating a new sovereign, the people. It was still uncertain whether the new sovereign, if made incompetent by ignorance, or misled by demagoguery or inflamed by passion might not be as tyrannous as the old.

A new nation was being brought forth, conceived in new ideals and dedicated to a new governmental experiment. The states mistrusted the national government. The nation was not sure of co-operation of the states. The people feared for their liberties and their leaders did not wholly trust the people. In fact, in the original constitution very little was left to popular action. No federal executive officer was elected by the people nor did the states have any voice in the appointment of any federal officer.

The president and vice president were elected by a specially appointed body of men exactly equalling the number of senators and representatives in congress, none of whom could hold any other federal office. It was to be a small

group exercising its independent judgment. Even these were not chosen by the people. No federal judicial officer was elective nor did the states have any voice in their selection. Federal senators were to be elected by the state legislatures. They were to be an aristocracy in statecraft. It was feared the people might not choose senators wisely. A legislature was more to be trusted with that task. In the selection of representatives in congress, and in that only did the people have a voice. In fact, the people are mentioned in the original constitution only in the preamble and in article 1, section 2, cl. 1. They were treated better in the amendments. (See am. 1, 2, 4, 9, 10.)

But their active participation in the federal government in peace times prior to the extension of the ballot in senatorial elections by the XVIIth amendment and the popularization of the vote for presidential electors through political action was extremely limited. Not only were the people denied the elective franchise in the selection of all officials except representatives in congress but they were not even given the right to determine by what body, whether the legislature or a constitutional convention, an amendment to the federal constitution should be ratified.

In all but a very few of their possible dealings with the federal government the state was required to act through its legislature or its executive and not through its legislative power. In view of this attitude by the national government toward the states, it is not surprising to find that in the matter of fixing the times, places and manner of electing representatives in congress the same caution was shown and the duty to prescribe regulations were definitely cast upon the state legislatures. Even the legislatures were subject to congressional surveillance, so great was [fol. 33] the fear of popular opposition to the central government.

It may be urged that in interpreting the construction one should not sacrifice the spirit to the letter; that where popular control over legislative action is concerned one should adopt a liberal rather than a strict construction; and that where important public policies are involved one should lean toward a broad rather than a narrow view. If a conclusion contrary to what is herein expressed could have been arrived at by the application of the foregoing princi-

ples of interpretation, the court would not have hesitated to make the application.

But the court believes that its action in this case is controlled by a different cannon of interpretation, an even more important principle of judicial action. The question here is whether the court, under the guise of judicial interpretation, can in effect amend the constitution by substituting for the word "legislature" in Article I, section 4, the word "state" or the expression "legislative power of the state."

Criticism has from time to time been directed against the courts for their alleged usurpation of legislative powers by reading into constitutional clauses restraints upon the legislative policies beyond what was originally intended. It seems to this court that it would be a clear and indefensible act of judicial legislation if the court would construe the word "legislature" in the enlarged and comprehensive sense of "the state." The former is a well defined, well recognized branch of the state created by the state for a specific purpose. It ought not by interpretation to be construed as being synonymous with the state or with the whole legislative machinery of the state. So, to hold seems an unwarranted amendment of the federal constitution by striking out a word having a clearcut connotation, and substituting for it another word or phrase with greatly different connotations. The courts may not thus juggle with constitutional law.

Why should the framers of the constitution use a precise expression such as "legislature" at least 14 and possibly 15 times in the constitution and its amendments in one sense and then in one or at the most two other places use it in a different sense? Surely the possibility of confusion and conflict as to its meaning must have occurred to them.

It would have been easy for the framers of the constitution to have used an expression indicating that presidential electors shall be appointed and the times, places and manner of electing representatives shall be prescribed by the state or by law or by the state through its legisative power so as to bring out the difference, as was done in the XVIIIth amendment, if such distinction was intended to be incorporated in the constitution. If none was intended, the court may not find one by its power of interpretation.

There is nothing technical in this interpretation. It does not defeat the general principles of representative govern-

ment. It is not an interference with state rights. It is merely restricting the exercise of a certain federal function in accordance with the unambiguous language of the federal constitution to a branch of the state government created by and according to the constitutional wishes of the people of the state. Should the legislature which for the time is the agency of both the federal government and the state in the performance of the function of redistricting the state, perform its duties unacceptably, it lies within the power of congress to remedy the wrong.

[fol. 34] It will be urged that in Minnesota and elsewhere the construction here put upon the constitution is contrary to the practical construction given it by state legislatures and governors for many decades. Such construction may be resorted to in aid of the true meaning when the meaning is open to doubt. But, as was so clearly and convincingly established by the supreme court of Minnesota in the recent case of State ex rel University of Minnesota vs. Chase, 175 Minn. 259, 220 N. W. 951, constitutions cannot be amended by the doctrine of waiver or estoppel or non-user or even universal usage and custom. A different rule may prevail in a country which has no written constitution. In America it is the intent that must control the court. When that intent appears to be clear, the duty of the court is equally clear.

Summarizing this branch of the case and surveying the situation as a whole, the conflict between the legislatures as the creatures of the state and subject to its control and the legislatures as designated agencies of the federal government for the performance of federal functions free of state control, has centered around four constitutional propositions (1) the manner of appointing presidential electors. (2) the redistricting of the states in congressional elections; (3) the election of senators by the people; and (4) the right of the people by referendum to participate in amending the federal constitution.

It is apparent that the issues involved are not merely matters of constitutional construction but have been at times somewhat obscured by matters of political policy. There has been a constant struggle by the people to obtain a larger and more direct control in federal affairs. In the executive department this has manifested itself by dissatisfaction with the constitutional method of electing the

president and vice president. In the legislative department it has resulted in an amendment to the constitution providing for the popular election of senators. Through the primary election the voice of the voter made itself heard in legislative halls on senatorial elections even before the constitution was amended. Through the referendum the people sought to have a voice in the amendment of the constitution itself. The battles were frequently waged in the courts. The courts were divided, some construing the constitution in accordance with its historic and in its more obvious sense, some construing it in line with the political policies of the day. So far as popular participation in the election of senators was concerned, the struggle ended with the adoption (1913) of the seventeenth amendment.

So far as popular participation in amending the federal constitution was concerned, it ended with the case of Hawke vs. Smith (1920) in the supreme court of the United States. So far as popular voting for the president and vice president is concerned, it is accomplished through depriving presidential electors of any independent indiscretion and making them merely the agents of political parties. In 1911 at the request of the representatives of Ohio in the federal senate, congress resolved to subject the power to redistrict the states to the legislative power of the state including the referendum where it existed. In 1931 congress did not see fit to take any such action. The constitution has not been amended.

[fol. 35] Political policies are matters for legislatures, legislative agencies and voters. Where the language of the law is clear and unambiguous, the courts may not brush it aside, no matter how meritorious the political arguments or how objectionable the written enactments. As the supreme court of the United States said in Hawke v. Smith:

"There can be no question that the framers of the constitution clearly understood and carefully used the terms in which that instrument referred to the action of the legislatures of the states. When they intended that direct action by the people should be had, they were no less accurate in the use of apt phraseology to carry out such purpose."

Having in mind these considerations, the court concludes that Article I, Section 4, of the federal constitution was in-

tended by its framers to empower and require the state legislature and not the legislative power of the state to prescribe the times, places and manner of electing representatives in congress, subject only to the supervision and control of that power by congress itself.

2. It is argued with considerable vigor that under the Minnesota state constitution the redistricting act of the state legislature is valid, even though the reference to the state legislature in the federal constitution would bear the interpretation that is sought to be placed on it by petitioner. Article IV, section 23, provides that after each state and federal census "the legislatnre shall have power to prescribe the bounds of congressional, senatorial and representative districts and to apportion anew the senators and representatives among the several districts."

It is argued that this is a special provision giving the state legislature specific powers and that the powers given to the legislature by this section are not subject to the general provisions of Sections 11 and 12 of the same article requiring gubernatorial action on every "bill," "order," "resolution" or "vote." There is some force to the argument. But this force is greatly diminished by the fact that the federal and state functions were intermingled. As to the state functions, no good reason exists why they should not be subject to veto.

The argument is weakened still more by a casual inspection of the state constitution which shows that it contains a great number of similar specially enumerated duties, powers and functions. If all of these escape the possibility of the executive veto provided for in Article 4, Sections 11 and 12, the governor of Minnesota has very limited legislative responsibilities. On the whole, the claim appears to be without sufficient merit to be made a basis for upholding the act of the legislature. It must rest upon federal sanction or fail.

3. Unless the Act of 1911 is still in force, there is no congressional legislation prescribing how the several states shall be redistricted. The Act of 1911, paragraph 4, provided for the election of representatives from the districts existing on August 8, 1911, "until such state shall be redistricted in the manner provided by the laws thereof." There was no mention in this act of redistricting by the

legislature. On the contrary, the word "legislature" was studiously and intentionally avoided. In its place congress directed the redistricting to be done in the manner provided by the state laws.

In only one decision has the statute been construed. In [fol. 36] State vs. Hildebrant, 94 Ohio St., 154, N. E. 55, this very law was construed to take the power out of the exclusive jurisdiction of the state legislature and put it into the hands of the legislative power of the state. Under the language quoted there can be no quarrel with this decision. The supreme court of the United States on an appeal in the same case (241 U. S. 565) held that under this language a redistricting act had to be passed in Ohio according to its laws.

If this law were still in force and constitutional, it would be decisive of the issues. But it is no longer in force. The title of the act of August 8, 1911, read, "an act for the apportionment of representatives in congress among the several states under the thirteenth census."

Section 1 of this act provided for the total number of members in the house of representatives and apportioned them among the several states. This section clearly is now of no further effect. Section 2 provided for the contingency of New Mexico and Arizona entering the union as states. It has no application to the present situation. Section 3 provides that any state "entitled under this apportionment to more than one representative" shall be divided into the same number of districts as it has representatives, each district to elect only one representative, and provides that such districts shall be compact, contiguous and contain as nearly as practicable an equal number of inhabitants. Congress may change its ideas as to the mode and manner of redistricting states under some other congressional reapportionment.

The court would have to read into this section the words "and subsequent reapportionments," in disregard of its title and express language, in order to give it vitality when the reapportionment under the thirteenth census is at an end. Courts have no power to amend legislative acts however desirable such an amendment might seem to be. Section 3 expired by its own limitations when the apportionment it undertook to regulate had ceased to be in force. For precisely the same reason, section 4 of the Act of 1911

has no further legislative power. This law was clearly a temporary law enacted for a specific purpose and a limited period of time. When that purpose was accomplished, when the period had come to an end, the legislation came to an end with it. The Act of 1911 is no longer on the scene.

The point has been made that even if the act of 1911 or any of its sections were permanent legislation, insofar as it attempted to vary the powers conferred on the state legislature by article I, section 4, it was unconstitutional and void. It is claimed that in State vs. Hildebrant, supra, the constitutionality of the act of 1911 was not raised, argued or decided. Under the views already expressed by the court, it is unnecessary to determine this issue. Some of its constitutional aspects were however apparently raised, argued and decided in that case.

4. In his message to the legislature, as set forth in plaintiff's petition, the governor of Minnesota vetoed the bill because of numerical inequalities in the redistricting plan adopted. These inequalities are undeniable. They appear to justify the governor's strictures. Under the view of this court, that the act of 1911 has no application to the appor- [fol. 37] tionment under the fifteenth census, there is no federal, legislative or constitutional provision requiring congressional districts to be compact, contiguous and as nearly equal in population as practical. Consequently, this court cannot hold the act violative of any federal mandate. Neither is there any state nor constitutional requirement, which, if it were applicable, could be invoked to support a judicial veto of the act. Perhaps if the numerical inequalities were so gross as to be in effect a denial of representation to a substantial portion of the population or so arbitrary and unreasonable that the court would be justified in concluding that the act amounted to a failure to redistrict or if it were palpably corrupt, the court might set the act aside upon the ground that the legislature had failed to exercise any legislative discretion at all. But that is not the situation. The voters in the fifth congressional district with a population of 344,500 may complain that they have been treated unfairly as compared with the voters in the first congressional district with a population of 228,596. That presents a legislative or political, not a legal question, and calls for action by the voters or legislators of the state, not by the courts. Even if the act of 1911 were

in force, it is doubtful whether under the principles just stated that act would justify judicial interference.

Loevinger, J.

[fol. 38] [File endorsement omitted]

EXHIBIT "D"

IN SUPREME COURT OF MINNESOTA

No. 192. 28679

THE STATE OF MINNESOTA Upon the Relation of W. YALE SMILEY, Appellant,

vs.

MIKE HOLM, as Secretary of State of the State of Minnesota, Respondent

Wilson, C. J., Dibell, J., & Stone, J., Dissenting

Syllabus

1. The apportionment act of the congress of August 8, 1911, 37 St. L. 13, was superseded and replaced by an act of the seventy-first congress approved June 18, 1929, entitled "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of representation in Congress."

2. The word "legislatures" as used in the United States Constitution, Art. I, § 4, is construed as meaning the representative body which makes the laws of the state; not synonymous with the law-making power of the state; and does not include the governor of the state.

In making a congressional apportionment the state legislature acts exclusively under said Art. I, § 4 and does not act strictly in the discharge of legislative duties as a law-making body, but as an agency responding to a federal mandate.

3. The majority vote of the Senate and House of Representatives in redistricting the state for congressional purposes under Art. I, § 4 was effectual though the matter was put in the form of a bill, in the form of a law.

4. Upon the record there is no room for the application of the doctrine of practical construction.

5. Upon the record the court could not interfere with the division of the state upon ground of inequality of population and want of contiguity even upon the hypothesis that the provisions of the act — 1911 still prevailed.

6. Since we have held that the act of 1929 supersedes [fol. 39] and wholly replaces the act of 1911, and that the authority under the former is unrestricted, unlimited and absolute, it follows that the action of the legislature in the performance of their duty thereunder is beyond the reach of the judiciary.

7. It is held that the determination of the legislature, as more fully stated in the record, in no way violates the fourteenth amendment to the United States Constitution.

Affirmed.

OPINION—Filed Oct. 9, 1931

WILSON, C. J.:

The appeal is from an order sustaining a demurrer to the petition of relator, a citizen and taxpayer, on the ground that it did not state facts sufficient to constitute a cause of action.

These proceedings arise from an act of the seventy-first congress, approved June 18, 1929, entitled, "An act to provide for the fifteenth and subsequent decennial censuses and to provide for apportionment of representatives in Congress." The effect of the act was to reduce Minnesota's representatives in the House of Representatives of the Congress of the United States from ten to nine members. Intending to divide the state into nine congressional districts, there was introduced in the House of Representatives in our state legislature a bill known as H. F. 1456, and which in form specified the counties to constitute each of such nine districts. This measure passed the House on April 16, 1931, and the State Senate on April 20, 1931. It was transmitted to the Governor who promptly returned it to the House, where it originated, without his approval and with his written objections which in form constituted a veto. Two days later the House adopted the following resolution, to-wit:

"Whereas, on the 16th day of April, 1931, The House of representatives of the State of Minnesota duly passed H. F. No. 1456, a bill for an act to divide the State of Minnesota into nine Congressional Districts, and

[fol. 40] "Whereas, on the 20th day of April, 1931, said H. F. No. 1456 was duly passed by the Senate of the State of Minnesota; and

"Whereas, said bill is now in the possession of the House,

"Now, therefore, be it resolved, That the Chief Clerk of the House be and he is hereby directed to deposit for filing with the Secretary of State the enrolled copy of said H. F. No. 1456, said bill to become and remain part of the permanent records of the office of the Secretary of State."

Five days later H. F. No. 1456 was deposited with the Secretary of State in accordance with the terms of the foregoing resolution.

The population of the various congressional districts as specified in H. F. 1456, as shown by the census of the United States for the year 1930 was as follows:

"First congressional district	228,596
"Second congressional district	251,734
"Third congressional district	291,601
"Fourth congressional district	286,721
"Fifth congressional district	344,500
"Sixth congressional district	301,984
"Seventh congressional district	326,391
"Eighth congressional district	276,633
"Ninth congressional district	253,786"

An equal division of our population of 2,551,586 would allocate 283,509 inhabitants to each congressional district.

It is the duty of the secretary of state to receive filin- of candidates for nomination to the office of representative in congress from all persons eligible to be candidates thereat; and to refuse such filings for nomination thereto when persons tendering the same appear to be ineligible. He also has charge of the printing of all necessary ballots, the expense of which is usually greater than the income from filing fees.

Soon after the adjournment of the 1931 session of our state legislature, a controversy arose as to whether the legislature had in fact prescribed the congressional dis-

tricts in the state or whether the governor's veto had invalidated the efforts of the Senate and the House. The secretary of state claiming the governor's veto was a nullity acted upon the theory that new districts had been [fol. 41] created and accepted a filing fee from one or more persons as candidates in at least one or such districts and refused to accept filing fee from one who sought to be a candidate at large upon the theory that the legislature had failed to comply with the requirement of congress. The relator herein seeks to sustain the veto of the governor and to have determined the question as to whether or not the proceedings of the Senate and the House are a nullity.

In the United States Constitution we find:

Art. I, §4. "The times, places and manner of holding elections for Senators and Representatives shall be prescribed in each State by the Legislature thereof; but Congress may at any time by law make or alter such regulations except as to places of choosing Senators."

In the Constitution of the State of Minnesota, we find:

Art. IV, §1. "The Legislature shall consist of the Senate and House of Representatives which shall meet biennially at the seat of government of the State."

On August 8, 1911, the congress passed an act for the apportionment for representatives in congress among the several states under the thirteenth census. 37 St. L. 12, Ch. 5 (U. S. Code Title 2, §3). It was therein provided that the congressmen should "be elected by districts composed of contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants." Such provision is not found in the language of the act of June 18, 1929, 46 St. L. 21. It is the contention of the appellant that said provision of the 1911 law is still in force because the act of 1929 provides that such redistricting should be made.

"By apportioning the then existing number of Representatives among the several States according to the respective number of the several States as ascertained under such census by the method used in the last preceding apportionment."

It is claimed that the foregoing language reads into the statute of 1929 that portion of paragraph 3 of the 1911 statute which requires that the districts be composed of [fol. 42] contiguous and compact territory and containing as nearly as practicable an equal number of inhabitants. It is also pointed out that the language of the 1911 act provides that representatives to the sixty-third congress "and each subsequent congress" should be elected from such districts.

The principal questions presented by appellant are, first, that H. F. No. 1456 is invalid because vetoed by the governor and not passed over his veto; secondly, that if H. F. No. 1456 is otherwise valid, the provisions of the same dividing the state into districts are so arbitrary and unfair as to violate the provisions of the act of the congress of August 8, 1911, and also certain provision of the federal constitution.

1. For a long time congress passed apportionment acts following each decennial census act. Obviously these decennial statutes were enacted to meet the change in population and it was always apparently contemplated that ten years hence another law of similar character would be enacted. In 1920 the congress did not enact such a law. Consequently the 1911 statute served. It was a general and permanent law at least for a time and congress very properly caused the same to be included in the judicial code in 1926. Section 3 of the act of 1911 is as follows:

"That in each State entitled under this apportionment to more than one Representative, the Representatives to the Sixty-third and each subsequent Congress shall be elected by districts composed of a contiguous and compact territory, and containing as nearly as practicable an equal number of inhabitants. The said districts shall be equal to the number of Representatives to which such State may be entitled in Congress, no district electing more than one Representative (37 Stat. L. 14)."

We construe the foregoing section as meaning that the provisions thereof were applicable only to elections held under "this apportionment" i. e., pursuant to the act of 1911. The law was apparently so written to so limit its application. The history of the enactment of these laws, necessitated by the national decennial census, confirms this

belief. No such law having been passed by congress in 1920, the congress in 1929 apparently to meet the past omission and to avoid a repetition enacted the 1929 law [fol. 43] which called for the fifteenth and subsequent decennial censuses and to provide for apportionment of representations in congress. It embraced the two subjects which had usually been covered by separate acts. Upon the enactment of the 1929 law the 1911 act so limited by its own language and so replaced by subsequent law "was no longer upon the scene". The later law contained a clause repealing all inconsistent laws. Some portions of the 1929 law were inconsistent with the same sections in the 1911 law. In fact the 1929 law made provision which would replace all of the 1911 law unless it was that portion of § 3 requiring the districts to have the characteristics therein mentioned. It is true that many statutory laws are cumulative and additional, but such statutes usually involve remedies whereby a class of persons may proceed under a prior law or under the one which gives cumulative or additional remedies. In the case before us the history, nature, purpose and language of these statutes disclose a clear intention on the part of congress to have each of these apportionment acts replace its immediate predecessor. We believe it was the intention of congress to have the 1929 statute supersede and take the place of the entire statute of 1911. Until the 1911 act it was made the duty of the legislatures of the several states to divide the respective states into districts. Such was their constitutional duty. The 1911 act went further and provided that the state legislatures in redistricting should act in the manner provided by the state laws. This was to reach and include the referendum, existing in some states; particularly in the state of Ohio. The clause "by the method used in the last preceding apportionment" as used in the 1929 act we construe as relating exclusively to the arithmetical method of computation.

Congress has never attempted to modify the grant of this constitutional power to the state legislature, but it did assume in the act of 1911 to direct how the duty should be performed, that is, in accordance with the laws of the state. Since no direction now exists we need not consider the power of congress to give this direction in the 1911 law.

[fol. 44] The constitutionality of that act may present a debatable question, but that is unimportant since we hold that that law is no longer in the picture.

2. The act of 1929 does not require the districts to be "composed of a contiguous and compact territory and containing as nearly as possible an equal number of inhabitants."

We are of the opinion that the various provisions of our state constitution cited in the briefs are of little importance in relation to the matter now in controversy. The power of the state legislature to prescribe congressional districts rests exclusively and solely in the language of § 4, Art. I, of the United States Constitution. The provisions of the state constitution control and operate when the ordinary affairs of the state are involved. They cannot of course prevail as against the provisions of the superior fundamental law of our nation.

The legislature is required to "prescribe" the times, places and manner of holding elections. This means "to lay down authoritatively as a guide, direction, or rule of action; to impose as a peremptory order; to dictate; appoint; direct." (Webster's New International Dictionary.)

The command to the legislature comes, as indicated, from the United States Constitution. The reason why the state legislature acts in the matter is because of a mandate not from the people of the state, but from the people of the United States. It seems then that our first question is to be solved by ascertaining the meaning of the term "legislature" as found in the federal constitution, Art. I, § 4.

The ordinary meaning of the word "legislature" is that it refers to the Senate and House of Representatives which our state constitution says constitutes the "legislature". Within this meaning it indicates the representative body, which makes the laws of the state, and of which the chief [fol. 45] executive is not a part, although he has a limited restraint upon the enactment of state laws. Perhaps the veto power is a legislative power. Gottstein v. Lister, 153 P. 595; Spokane Grain & Fuel Co. v. Lyttaker, 109 P. 316; In re Opinion of the Justices, 107 Atl. 705, 5 A. L. R. 1407. The word "legislature" has also been used to indicate "the lawmaking power of the state." In re: Schrader v. Polley, 26 S. D. 5, 127 N. W. 848; Hawke v. Smith, 100 Ohio State 385, 125 N. W. 400; State v. Howell, 107 Wash.

167; Stuart v. Chapman, 104 Me. 17, 70 Atl. 1069; Davis v. Hildebrant, 241 U. S. 565. Appellant urges us to so hold. Under our state constitution the legislature consists of the senate and the house of representatives. We believe the word is ordinarily so understood. The frequent expression that our state, like the nation, has three branches of government, executive, legislative, and judicial, is seldom, if ever, understood as meaning that the governor is a part of the legislative.

In what sense was the word used in the federal constitution? Unless a contrary intent appears we must accept words as used in their ordinary meaning; if so, little construction is here required.

The word "legislature" is found in other portions of the federal constitution. The members in the lower branch of the congress shall have the qualifications requisite to be members of the lower house of the "state legislature." Article I, § 2. Also see amendment XVII. Prior to the adoption of the seventeenth amendment providing for the election of United States senators by popular vote, they were chosen by the "legislature." Art. 1, § 3. The seventeenth amendment also authorized the "legislature" to empower the executive authority to make temporary appointments to fill vacancies in the United States senate until the people fill such vacancies as the "legislature" may direct. Prior thereto the governor was authorized to fill such vacancies by temporary appointments until the next meeting of the "legislature." Art. I, § 3. It is provided that the United States shall protect each state against do- [fol. 46] mestic violence upon application of the "legislature." Art. IV, § 4. It provides that members of the "state legislature" shall take a certain official oath. Art. VI. The phrase "members of the legislature" is used in amendment XIV, § 2, and also in § 3. It provides for the "consent of the legislature" to the United States government buying lands for certain purposes. Art. I, § 8. It prohibits two or more states merging without the "consent of the legislatures of the states concerned". Art. IV, § 3. It provides that amendments may be ratified by the "state legislatures". Art. V. The same article provides that congress upon application of the "legislatures of two-thirds of the several states shall call a convention for proposing amendments." It is provided that the presidential

electors shall be appointed as the "legislature" may direct. Art. II, § 1. Then we have the provision now under consideration.

In the days when the "legislature" elected the United States senators, it was never suggested, so far as we are advised, that the governor could apply his veto power. Indeed in all the use of the word "legislature" in these various provisions in the federal constitution, it would seem that it was used in the same sense—in the ordinary meaning, i. e. as being the representative body which makes the state laws and not all the governmental machinery which constitutes the lawmaking power of the state. Indeed at the time of the adoption of the federal constitution there were seven or more states wherein the veto power did not exist.

We think it was the spirit of the framers of the Constitution that in ordinary questions of governmental affairs, the majority should rule. We see no reason why they would intend to advance the proposition that if the governor was opposed to the judgment of the legislature, that it would have to determine questions referred to it by a two-thirds vote, as is required by our state constitution, instead of by a majority vote, while in those states where no veto existed a majority would always control. We can not think that such consequential situation was intended. We must view the situation from the viewpoint [fol. 47] of the framers of the Constitution as it then appeared in their light. We cannot be controlled by what one might think the law ought to be now. The construction of such constitutional provisions sounds in fundamentals. The word "legislatures" as so used necessarily had reference to legislatures as they were then known. A constitution must always be construed in the light of its history. The referendum was then unknown, and where it has been considered as a part of the lawmaking power relative to Art. I, § 4 it was because of the act of 1911 providing that the redistricting was to be done according to the laws of the respective states. Congress itself, by that act recognized the referendum as a part of the legislative authority of the state.

It is now the settled law that the state legislature in ratifying amendments to the federal constitution, does not act in the discharge of its legislative duties as the law-

making body but does act for and in behalf of and as representative of the people of the state, under the power conferred by Art. V of the federal constitution. Hawke v. Smith, 253 U. S. 221; Barlotti v. Lyons, 182 Cal. 575; Decher v. Secretary of State, 209 Mich. 565; Whittemo- v. Terral, 140 Ark. 493; Prior v. Noland, 68 Colo. 263.

The legislature in districting the state is not, strictly in the discharge of legislative duties as a lawmaking body, acting in its sovereign capacity—but is acting as representatives of the people of the state under the — granted by said Art. I, §—. It merely gives expression as to district lines in aid of the election of certain federal officials; prescribing one of the essential details serving primarily the federal government and secondly the people of the state. The legislature is designated as a mere agency to discharge the particular duty. The governor's veto has no relation to such matters; that power pertains, under the state constitution, exclusively to state affairs.

The word "legislature" has reference to the well recognized branch of the state government—created by the state as one of its three branches for a specific purpose—and [fo. 48] when the framers of the federal constitution employed this term we believe they made use of it in the ordinary sense with reference to the official body invested with the functions of making laws, the legislative body of the state; and that they did not intend to include the state's chief executive as a part thereof. We would not be justified in construing the term as being used in its enlarged sense as meaning the state or as meaning the lawmaking power of the state. We are of the opinion that the authorities support our conclusion. Hawke v. Smith, 253 U. S. 221; Brooks v. Fischer, 79 Cal. 173, 4 L. R. A. 429; Barlotti v. Lyons, 182 Cal. 575; Decher v. Secretary of State, 209 Mich. 565; Whittemore v. Terral, 140 Ark. 493; Prior v. Noland, 68 Colo. 263; In re Opinion of the Justices, 118 Me. 544; State v. Morris, 79 Okla 89; Carson v. Sullivan, 223 S. W. 571; Ex Parte Dillon, 262 Fed. 563; In re Opinion of the Justices, 254 Mass. 617. It follows that the governor's veto herein was a nullity.

State ex rel. Schrader v. Polley, 26 S. D. 5 is not in harmony with our conclusion. The opinion in that case was put upon two grounds, the first being based upon the theory that Art. I, § 4, did not delegate power to the legis-

lature or to the state to provide for the election of representatives, and it was said that this power was one reserved by necessary implication to the various states and that the whole purpose of Art. I, § 4 was simply to grant to the congress the power to supersede by law enacted by congress any state regulation on the subject. The second ground was, however, that the words "the legislature thereof" did not mean simply the representative body we have spoken of, but did mean the "lawmaking power" of the state as established by the state constitution, and including the peope of the state when authorized to act in view of the referendum provisions contained in the state constitution. The second ground in the Schrader case seems to have been overruled by Hawke v. Smith, 253 U. S. 221. We are not satisfied with the first reason given in support of the Schrader case and we speak with the utmost [fol. 49] respect for the learned judges who have reached a conclusion differing from ours. We feel that it was erroneous to claim that the action was taken under a power reserved to the people of the state without regard to the grant of power in the federal constitution. We think the state acts rather under a power surrendered to it. Certainly, congress must have the implied, if not the expressed, power to provide for the election of its members and to make all necessary laws in reference thereto. U. S. Const. Art. I, § 8. We have not considered the matters involved herein in as great detail as were covered by the helpful memorandum of the learned trial court and in reference to the reasoning of the South Dakota case we now quote with approval a portion of the memorandum:

"There can be no inherent power in the people of South Dakota to legislate for any one except themselves. There can be no inherent power in the people of the State to adopt a Federal Constitution or to amend the Federal Constitution which is to govern the inhabitants of other states and territories. As a matter of fact, that Constitution may be amended and they may be subjected to the effects of such amendment without their consent and contrary to their expressed wishes. The Representatives in Congress are officers of the Federal Government. They legislate for all the people of the United States. They govern the District of Columbia, the Territory of Alaska and the island possessions of the nation. It does not sound plausible that

any State may claim that it has inherent power or control over legislative, executive or judicial officers who are performing exclusively federal functions. The State does not have inherent power to determine who shall vote in a federal election, whether it be for President, Senators or Representatives. The right to vote in such an election is derived from the Federal Constitution exclusively. The Federal Government determines the term of office, the duties, powers and rights and the compensation of Senators and Representatives. It determines their apportionment to the several States. It is a Federal election to choose Federal Officers by Federal Electors, Ex. p. Yarbrough, 110 U. S. 651, 28 L. Ed. 274; Felix v. U. S. 186 Fed. 685. Congress has already fixed the time for Congressional elections. U. S. C. A. Title 2, § 7. Nothing is left to the States except through their Legislatures to fix the places of election. As in the case now before the Court, so in the Schrader case, this was done by districting the State. It does not seem to be either an inherent and reserved power of the people of the State nor does it appear to be State legislation subject to the State Constitution."

In ex rel. Davis v. Hildebrant, 241 U. S. 565, it was held that the act of 1911 expressly modified the phraseology of previous acts by inserting a clause mainly intended to pro- [fol. 50] vide that where, by the state constitution and laws, the referendum was treated as a part of the legislative power, the powers thus constituted should be held and treated to be the state legislative power for the purpose of creating congressional districts by law. The provision so inserted permitting the redistricting to be done by the state "in the manner provided by the laws thereof" permit a referendum under the laws of Ohio and substantially recognizes the referendum as a part of the legislature of that state. No such provision is contained in the present act. The Hildebrandt case seems to hold that Congress has the constitutional power to control the method by which the state legislature may act, and may or may not subject its action to the referendum. If that be the true interpretation of that case, the congress has now deliberately omitted any such requirement and reverted to the character of legislation in vogue prior to 1911 when no control over legislative method was attempted to be exercised. The Hildebrant case is discussed in Hawke v. Smith 253 U. S. 221.

3. The fact that the legislature voted upon the subject matter in the form of a bill is not controlling. Form does not control. We look to the substance. They voted upon the particular measure. No one misunderstood. The issue was clear. They definitely gave their assent to and expressed their determination fixing definite lines, accomplishing the redistricting as they saw fit. They prescribed the districts within the meaning of said Art. I, § 4. In short they did what the constitution said they should do. Their action was effectual.

4. Appellant calls our attention to the fact that on seven occasions prior to voting upon the measure now under consideration the legislature of this state has made state and federal reapportionments in the form of a bill for an act which was approved by the governor. We are of the opinion that such procedure as disclosed in appellant's brief is insufficient to support the claim of practical construction. We are also of the opinion that since the matter [fol. 51] here involved arises out of the federal constitution and its meaning is so clear and the purpose is so apparent, the language being used in its ordinary meaning, that there is no room for the application of the doctrine of practical construction. State ex rel. University of Minnesota, v. Chase, 175 Minn. 259; State ex rel. Morris v. Wrightson, 22 L. R. A. 548.

5. Dividing the territory into districts under Art. I, § 4, involved discretion, a discretion the extent of which cannot be well defined; a discretion on the part of the legislature, not on our part. If the provisions of the 1911 act were still in force, as contended, and serving as a command as to how the duty should be performed, we would be required to hold that the court could interfere only where such discretion is plainly and grossly abused. It is our function to review questions of law and not to revise official action involving the exercise of discretion. We are not to say whether the division is the best that could have been made, but whether the legislature proceeded acording to legal rules. The legislature in this matter was exercising a political and discretionary power granted by the federal constitution for which the members are amenable to their constituents. How nearly equal in population such districts may be made in actual practice must depend largely upon the integrity of the legislature; and we find nothing in the record author-

izing our interference even upon the hypothesis that the rule of conduct, as contained in the act of 1911, still prevails. State ex rel. Meighan v. Weatherill, 125 Minn. 336; Donovan v. Suffolk County, 225 Mass. 55, 2 A. L. R. 1334; People ex rel. Carter v. Rice, 135 N. Y. 473; People ex rel. Woodyatt v. Thompson, 153 Ill. 451; In re Baird, 142 N. Y. 523; State ex rel. Warson v. Howell, 92 Wash. 540; Wise v. Bigger, 79 Va. 269, 2 A. L. R. 1337 Anno. Though a case might arise that would require our disapproval this does not seem to be such.

[fol. 52] 6. However, as already stated, we hold that the act of 1929 wholly replaces the act of 1911, and that the authority so given by Art. I, § 4, is unrestricted, unlimited and absolute. That is, the authority is not hampered by requiring the duty to be performed in any particular manner. The law does not prescribe any rule of conduct controlling the performance of the duty imposed. Under such circumstances in administrative and political affairs and in the absence of constitutional limitations, the action of the legislature is beyond the reach of the judiciary. We have no right to and hope to refrain from putting up our opinion against the opinion of those in whom the exclusive right to redistrict has been lodged. Under the circumstances we simply have no control over the legislature. Richardson v. McChesney, 128 Ky. 363, 129 A. L. R. 299; State ex rel. Morris v. Wrightson, 22 L. R. A. 548, 2 A. L. R. 1337 Anno.

7. It is claimed that H. F. 1456 is so unfair and the districts are so unequal in population, that the redistricting is in violation of the fourteenth amendment to the federal constitution. A part of the argument is that two voters in the same district have the same power as three voters in another of the districts. The specific claim seems to be that the alleged violation of this amendment relates to the provision that "no state shall make or enforce any law which shall abridge the privileges, or immunities of citizens of the United States." It seems sufficient to say that while the constitution does not define the "privileges and immunities" of citizens, the right of suffrage is not one of them. Nor did the fourteenth amendment add to the "privileges and immunities" of a citizen. Minor v. Happersett, 21 Wal. 171; Pope v. Williams, 193 U. S. 632. We believe the argument advanced is fallacious and untenable,

and are of the opinion that the fourteenth amendment is in no way violated.

Affirmed.

[fol. 53] DIBELL, J., dissenting:

My view is that the apportionment of the state into congressional districts must be by legislation. Nor am I satisfied that if it is otherwise H. F. No. 1456, passed by the House and Senate and returned to the House by the governor as a vetoed bill and by its resolution ordered deposited with the secretary of state, without other action thereon, and without action by the senate, constituted an effective apportionment.

STONE, J., dissenting:

I cannot agree that, because in assigning administrative or political functions to state legislatures the constitution excludes all other state agencies, the same conclusion is forced where, as in Art. I, § 4, a specific law-making task is vested in them. Judgment based only upon identification of the agency selected ignores the more important factor of the kind of action demanded. Administrative and political action proceed in their own way and subject to their own peculiar limitations. Legislative action—law making—is something very different, especially in a republic.

The necessity of submitting the result to executive approval or veto, and the right to pass over a veto (although not found in all states) have from the beginning been characteristic of American constitutional government. Few other subjects gave the Constitutional Convention so much difficulty. Its members considered that the power of any legislature to make laws might wisely be subjected to a qualified executive veto. They so conditioned the law-making power of Congress. It could well have been contemplated, therefore, that while any other kind of action would be by the legislature alone, the purely legislative [fol. 54] function of law making would be subject to conditions imposed by the state constitutions.

Wanted in every such case is state action. McPherson v. Blacker, 146 U. S. 2, 36 L. Ed. 869. The legislatures but speak for the states. The manner of their speaking naturally is that best suited or ordinarily resorted to for disposing of the matter in hand. If the latter requires law

making, then law making of the ordinary kind and in the ordinary way must be contemplated.

That the Convention was consciously dealing with a law-making function in Art. I, § 4, is clear. The idea is suggested in the word "prescribed". It is confirmed by the grant to Congress of the power "by law" to make or alter regulations made by the states. "The times, places and manner of holding elections" are not only appropriate to be dealt with by law making but also wholly inappropriate to any other process. So I cannot conceive that the intention was any other than that the task assigned should be performed by ordinary state legislation. Any restriction of state power to subject the law making of its own legislature to executive veto must rest on remote and unnecessary implication and so there is no such restriction.

Because under American theory the people themselves are the source of all governmental powers and the federal constitution but a grant of some, there is merit in the reasoning of the judges in State ex rel. Schrader v. Polley, 26 S. D. 5, 127 N. W. 848. We never think of any reserved power of the states as one granted by the federal constitution to the new government and as immediately regranted by the same instrument to the states. But without bothering over mere language, the power now in question was plainly vested and confirmed in the state legislatures, however constituted. So far, the provision was satisfactory to the states at the time. But, Judge Story tell- us, the whole section "was afterwards assailed by the opponents of the Constitution, both in and out of the State conventions, with uncommon zeal and virulence. The objection was not to [fol. 55] that part of the clause which vests in the State legislatures the power of prescribing the times, places and manner of holding elections; for so far it was a surrender of power to the State governments. But it was to the superintending power of Congress to make or alter such regulations." Story on the Constitution (4th Ed.) § 814. There is no difference of substance between the South Dakota view that the power was "reserved" by the state governments and that of Judge Story that it was surrendered to them. They agree that the power remained in the "state governments." Had the state conventions, or any single member of any of them considered any other view tenable, the debates would show it. The "uncommon zeal and virulence" of the opponents of adoption were such

that not even slight and technical objections to the new national government were overlooked. This one, if any one had thought of it at all, would have been made much of, for the whole fight on the Constitution was grounded on its effect as a surrender of state power.

McPherson v. Blacker, supra, is helpful only by contrast. The power there involved, of the state legislatures in the selection of presidential electors, was not legislative but political in character. Ohio ex rel. Davis v. Hildebrant, 241 U. S. 565, 60 L. Ed. 1173, seems to me decisive of the main question. The power of Congress principally discussed was that to decide what is republican government within the constitutional guaranty thereof to the state. It is to that alone that Mr. Chief Justice White directed most of his reasoning dealing with the powers of Congress. It was considered plain, assuming the power had been invoked, that Congress had recognized, in the Act of 1911, that the referendum did not introduce any such "virus" as to make the Ohio state government other than republican. It was not held that Congress had any power whatsoever to make or unmake the referendum as a part of the state legislatures as meant by Art. I, § 4. On the contrary, the states are repeatedly referred to, in respect to their functions under that section, as acting "through their legislative au-
[fol. 56] thority" or as exercising "state legislative power for the purpose of creating Congressional districts by law." That is, "legislature" as used in Art. I, § 4, was considered synonymous with "the legislative power" of the states. Hence, it was concluded, the involved redistricting act was properly subject to veto by referendum under the Ohio constitution.

That conclusion is impossible unless Art. I, §4, invokes the whole legislative power of the states.

In that assertion I do not overlook the discussion by the court of the Act of Congress of 1911 and its effect, "in so far as Congress had power to do" it, of recognizing the validity of a referendum on a state redistricting act. The limitation, "in so far as Congress had power to do", is significant. Whatever power is possessed by the states or their legislatures has been the same ever since the constitution was adopted. The exercise of that power is subject to supervision (ex parte Siebold, 100 U. S. 371, 25 L. ed. 71) but the grant of it not to modification, by Congress. That

body can no more modify or impose new conditions on the constitutional confirmation of state power than it can amend the grant of its own. So it cannot say how or by whom the state power shall or may be exercised. It cannot say of what a state legislature may or may not consist for the purpose of its exercise.

Congress may "by law" make its own "regulations" or alter those of the states. It cannot say either that the state regulation shall or shall not be subject to veto by executive or people. That would be to amend the constitutional confirmation of power in the state legislatures which has always meant either that their power was or was not subject to such veto. The Act of Congress of 1911, while it could not change the Constitution, could and did construe it. The interpretation was that the whole legislative power of the state was invoked, the referendum to be or not to be a part of it as determined by the fundamental law of each state.

If, as we now decide, the term "legislatures," as used [fol. 57] in Art. I, §4, does not refer to the legislative power of the state, however exercised, but is confined to the members of the legislatures as such, and so excludes executive veto, it equally excludes veto by referendum, and both the opinion of Congress and the decision in the Hildebrant case are wrong.

That case was distinguished in Hawke v. Smith, 253 U. S. 221, 64 L. ed. 871. An Ohio referendum was again in question. It was held without effect on the ratification by the legislature of an amendment to the federal constitution. The argument that to require approval by referendum was simply one for ratification by the legislative action of the state was considered "fallacious in this—ratification by the state of the constitutional amendment is not an act of the legislature in the proper sense of the word. It is but the expression of the assent of the state to the proposed amendment."

The Hildebrant case was considered "inapposite" because, first, as said there, "Congress had itself recognized the referendum as part of the legislative authority of the state for the purpose stated." (As already shown, Congress could not make or unmake the referendum as part of the legislative power of the state for that or any other purpose. The most it could do was to recognize, as it did

by the act of 1911, that it was part of the legislative process in some states.) The court went on to say, next:

'It was held, (In the Hildebrant case) * * * that the referendum provision of the state Constitution, when applied to a law redistricting the state with a view to representation in Congress, was not unconstitutional. Art. I, §4, plainly gives authority to the state to legislate within the limitations therein named. Such legislative action is entirely different from the requirement of the Constitution as to the expression of assent or dissent to a proposed amendment to the Constitution. In such expression no legislative action is authorized or required.''

We are dealing now with legislative action. It is established that, if required by a state constitution, the referendum is a part of the legislative process. It must be equally [fol. 58] true that, when made so by a state constitution, executive approval and veto are parts of the same process and so not excluded by Art. I, §4.

I cannot concur either in putting aside so easily the argument that there has been a persuasive, if not a controlling, practical construction contrary to the conclusion of the majority. It is always easy for a court to remove a case from the reach of any sort of construction simply by asserting a lack of room for it. The contrary opinion of the court of last resort of our sister state of South Dakota is enough to make a real question. The comment already cited from Judge Story shows that the state ratifying conventions considered that the power concerning times, places and manner of electing congressmen, was left to unframmelled state action, except for the superintending function of Congress. The latter was all they objected to.

Without adequate historical search, my impression is that never heretofore has there been serious question that the state have the whole power of legislative action in the matter, except as Congress may make its own regulations or alter those of the states. Minnesota is but one of many states, (all of them so far as I know) where congressional redistricting has been always by ordinary statute. The present Chief Justice of the United States, when governor of New York, expressed himself on the subject of congres-

sional redistricting to an extraordinary session of the legislature in 1907 as follows:

"It is not my purpose to propose a particular plan of apportionment. It is the function of the legislature to formulate such plan and submit it by suitable bill for executive action." Public Papers, New York, July 8, 1907, p. 52.

Congress has always assumed that congressional redistricting could be by ordinary state legislation, participated in by the executive through the right of veto where required by fundamental state law. That it has considered also that such legislation may be subject by state law to veto by referendum is plain from the Act of 1911 and the debates concerning it. 47 Cong. Record, 3436, 3437, 3507.

[fol. 59] One thing more. Our legislature thought that it was proceeding in the ordinary way, by "A Bill for an Act" which, before becoming effective as law, would need approval by the governor, unless passed over his veto. As such and not otherwise it was submitted to him. Only the lower house, after his veto and in default of repassage, ordered the measure filed with the secretary of state. It strikes me that we ought not so far to disregard the intention of our own legislature as to say that its purpose was other or different from what so plainly appears, that is to enact state law in the ordinary fashion but first to subject it to executive disapproval. So possibly we do not have before us the question that would arise had the legislature intentionally proceeded independently of the governor. The scope of their action they themselves define so plainly as to negative that intention. They attempted only to enact a state law. I question whether we can exempt it from any of the applicable provisions of our state constitution.

As to the substance of the measure, I agree that we cannot hold it a transgression of legislative power. I agree also that the act of Congress of 1911 is wholly superseded by the one of 1929.

For the reasons above given, I think that the order appealed from should be reversed.

[fol. 60] Clerk's certificate to foregoing transcript omitted in printing.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed February 15, 1932

The petition herein for a writ of certiorari to the Supreme Court of the State of Minnesota is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1711)